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THE TRIAL OF PETER YORK.

As the points of law involved in this case are of unusual importance, we have thought proper to give our readers a full account of the proceedings, that the bearing of every circumstance may be ascertained. The point finally passed upon by the court has not been exceeded in interest and importance by any decision in criminal cases in this country for many years; and it is not a little remarkable that so many capital cases should have passed off in England and America during the last hundred years, without the necessity of deciding, in full bench, this question which is so wrought into the texture of criminal jurisprudence.

Peter York was indicted for the murder of one James Norton, in the city of Boston, on the night of the 2d day of July, 1844. The bill was found in one week after the time alleged, and the trial was held at the close of the same month.

The judges present were, the Hon. Lemuel Shaw, C. J., and Wilde and Hubbard, justices. Samuel D. Parker, the attorney for the commonwealth, conducted the prosecution, and the court assigned, as counsel for the prisoner, George W. Phillips and Richard H. Dana, jr.

The evidence on the part of the government was substantially as follows. We omit the arguments to the jury on each side, as the chief professional interest will be in the points addressed to the court.

Jabez Pratt. I am coroner of the county. Was called at about

midnight by the watchman, and found the dead body of a man lying on the sidewalk in Ann street, near Richmond street, at the foot of Keith's alley. It was bright moonlight. A house at the head of the alley, kept by a negro named Clash, had been open for a dance, which had just broken up. A cloth cap [produced] was found in the alley, put behind a barrel. Deceased had no cap on. Heard some rumors from the people that came from Clash's, about Peter York. He was standing by the body, among the rest. Arrested and examined him, but let him go, there being no sufficient evidence against him. Found a long oak stick [produced] in a cellar behind the fence, where the deceased lay. Heard that it was the bar to the door of a house in Richmond street, kept by a woman called French Mary. Went to the house. The bar fitted the door. Found a black girl there, called Elizabeth Clark. From her conduct I was led to arrest her and carry her to the watch-house. From what Elizabeth Clark said, I was led to send again for Peter York. The officers found him in a house in Charlestown street, at a place called "New Guinea," in another part of the city. Had heard something said about his knife, and questioned him. He said he had a long white-handled knife. An examination of the deceased's body was held the next day. The point of a knife [produced] was found sticking in his heart.

Cross-examined. When I found the body, there were marks of blows about the head. There was a little blood there. A number of people about that night. Deceased was an Irishman. There was great excitement among the Irish. Was led to arrest York from being told that he had changed his jacket. What I heard about Peter's knife was from Elizabeth Clark. It was a time of great confusion. Elizabeth Clark was a witness against Peter at the former trial, and before the grand jury. She is now in keeping of the government as a witness. There was a black girl, named Sarah Mulliken, about at the time. I talked with her. Did not arrest her. She was not before the grand jury. A man named George Daly was examined before the coroner and jury, and was not bound over.

Drs. Parkman and Moriarty testified, substantially, that the deceased was a white man, apparently about thirty-five years of age, and with no sign of disease about him. They examined him, and found the piece of knife produced sticking in his heart. The wound was sufficient to cause his death. After receiving such a wound he might run a hundred feet or more, and be capable of some sudden and violent action.

Cross-examined. Deceased was a large-framed man, of good

muscular proportions. There were wounds about the head, and his hair was clotted with blood. The wounds on the head were flesh wounds.

John Norton. Am brother of the deceased. Live in South Boston. He lived in Williams's court, and worked at Lull's stable. He left me the night of his death, at East Boston, about nine o'clock, and said he was going home. The cap produced is his cap.

Cross-examined. We are Irishmen by birth. His boarding place is nearly a mile from Richmond street. He told me he was going right home.

William Elliot. Live at corner of Richmond and Ann street. On the morning after the murder found the handle of a knife in my cellar. About half the blade was broken off. [Produced, and found to fit exactly to the piece of blade found in the heart of the deceased. Has a white handle; shuts back with a spring when open; has one cutting side and a sharp point, and is about seven inches long, including blade and handle.] My cellar has a window on the street. This window was open on that night. Found the knife just under the window.

Cross-examined. Don't know whether the knife was open or shut. Kept it and carried it in my pocket about a fortnight after this. Gave it to a watchman. Have had no communication with Elizabeth Clark. Am an Irishman. Knew nothing of the murder until the next day.

Levi Harris. Known Peter York ten or twelve years. Often seen him wearing such a knife as this. It seems to be the same that he wore.

William Nutter (colored.) Often seen York with this knife. This is his knife.

Luke Thompson (colored.) Am a seaman. Was at Joe Clash's dance that night. Known Peter York ten or twelve years. Going down Keith's alley about twelve o'clock, met Peter. A little boy, without shoes or hat, said, "You'd better go away from here; you've killed that man." I said, "What's the matter, Pete?" He answered, "I've knocked a son of a b—h in the head." He stood near a barrel in the alley. We went down the alley to Ann street. As we went he said, "I believe I've cut the son of a b—h in two." I saw the man lying there. I thought he was only beaten. I said to Peter, "If you've beaten him, use him like a man. Pick him up, and start him out of this." An Irishman standing by, asked Peter to help him get him up. Peter answered, "D—n the man, I've nothing to do with him." He told me to come away.

He said, "God d—n the man; let him die," or something of that sort. In the early part of the evening Peter had on a light sack coat. At the latter part, after the man was found, he had on a thick gray sack. This knife is the one Peter wore.

Cross-examined. Prisoner is a sailor. Has been in the navy. Recently left a man-of-war. It was after Peter said, "I believe I have cut him in two," that I said, "If you've beaten the man, pick him up and treat him like a man." I did not then think or suspect that the man was more than flogged, and perhaps was drunk. There were a good many people about, and a good deal said; a good deal of confusion. There were marks on the man's head from a blow. There were brick bats near him, one was under his head. I had no suspicion that the man had been stabbed until the wound was found on his body, after the doctor came. I thought he was drunk, and that Peter had licked him. Saw 'Liz Clark early in the evening at French Mary's.

James Callaher. Knew Peter York before this time. Saw him in a dance-cellar in Ann street, that evening. This is his knife. Have often seen it. About twelve o'clock saw him at corner of Ann and Richmond streets. The man was then dead. Peter had on a different coat from what he had early in the evening. A little before this, Robert Brown and I were going along Ann street, heard a noise in Richmond street, somebody laughed loud, and there was a running. Then Norton came round the corner, holding on to his head. He ran a few steps, picked up two bricks, and ran toward me and fell. Blood ran from his head. Thought he was drunk and had been fighting. After he was dead I told Brown I thought Peter York's knife had done that. Brown said he was not afraid to bet. I went to Richmond street and saw York there. I said, "York, you'd better put that knife away; you've killed the man." He said, "Oh, I've done with that, I've broken it off in him." York followed me to where Norton lay. Some one said he did it, and he was examined, but released. It was said that he had gone to "New Guinea." Met Luke Thompson. He told me what York said to him, and I told him what he said to me. Thompson said, "Let's blow on him." I said, No. I said that 'Liz Clark knew, and they would take her up, and then we could be witnesses.

Cross-examined. I have no particular business or occupation. Have had none the year past. Am about nineteen years of age. When I saw Norton fall Clash was at the foot of the alley. As Norton fell, two girls ran from Richmond street towards Norton, and laughed and ran away. One was Sarah Mullikin. Cannot

say who the other was. No other women there but these two. When I went away I had no suspicion that the man had been killed. I went down Richmond street. It was light. Do not know why I went there. Can't say that I saw 'Liz Clark there. She did not speak to me at that time. I was in the dance-cellar that night. I did dance with a black girl. [The witness is a white lad.] Her name was Jane. It was not 'Liz Clark. Remember a fight in the cellar. No man came round the corner with the girls. I never played cards with Peter York. Never quarreled with him. The only reason why I thought 'Liz Clark knew all about it, was because some one had said so. When Norton fell, he had a brick in each hand.

James Brown, (colored.) Prisoner had two coats, one gray and one thin white coat. He boarded with me. About twelve o'clock that night he came to the house and changed his coat. This is like the knife he wore.

Cross-examined. When York came for his coat I was abed. My bedroom was on the lower story. The door was locked. He had been in before and took off his coat and went out without any. In a few minutes he came again, and the door was locked, and he knocked at my window and asked me to hand him his coat. Both his coats hung by the window. He did not tell me which to hand him. I handed him the gray one. Peter's knife was one that he always used. It was a clasp knife with a spring back. One side would cut. He always wore it. Wore it in his pocket, like any other clasp knife. He used it to cut his nails with, and for other purposes for which a pocket knife is used. I used to borrow it of him. It was a handy knife for many purposes. He had no other knife. He lent it freely to any body.

Thomas Griffin. Am one of the city watch. Was called. Saw the man with a heavy blow on his head, lying in Ann street, near the foot of Keith's Alley. Clash was there. Found a cap behind a barrel in the alley. This is it. It was put away carefully. Some one said Peter York had changed his clothes. He denied having done so. Found a long oak bar in the cellar. People said it belonged to French Mary's door. We went there. She was there, and a girl they call 'Liz Clark. French Mary is a quatroon. 'Liz is a negro. Looked round the room, aud saw a spot where 'Liz Clark sat, that looked like blood. I asked her if that was not blood. She said it was tobacco. She swore and raved. We arrested her. She said she had been in prison. Going to the watch-house she said it was Peter York. Thompson told us it was Peter York, and that he had gone to New Guinea.

We went to New Guinea, to the house where they said Peter was, called the Flat-iron. Went into the entry. A door opened, and Peter came out. Took him to the watch-house. He was asked as to his knife. He said he had lost it recently. Callahan said he knew it was York's knife from the appearance of the wounds.

Cross-examined. Prisoner made no resistance when we arrested him at New Guinea, no attempt at escape. York gave an accurate description of the knife, when questioned, as to its length, breadth and appearance, so that I could have identified it from that. 'Liz Clark seemed angry when I told her it was blood.

Joseph Gilmore, (colored.) I played the violin at Joe Clash's that night. The dance broke up about twelve o'clock. I came down the alley. Saw the man lying there. Some one said, "This man is hurt." They wanted to pick him up. Prisoner was there. He said, "Come away from him, I gave him his death-wound." He had on a white sack and cap.

Cross-examined. I have been in the United States service. My name then was Joseph Holmes. Before I went down the alley I heard that there had been a fight. 'Liz Clark was not there. Peter was in the dance-hall fifteen minutes before this. After I got to the foot of the alley I saw Norton fall. He came from Richmond street. He had a brick in each hand. He fell toward me. When the man fell there was no one in the alley or in the street but me and Peter. I went back to Clash's. Clash was then in the hall. I thought the man had been hit with a brick. I played a set after I went back. They danced half an hour after this. I did not testify at the trial last summer. I knew the trial was going on. I did not tell anybody that I knew anything about it. 'Liz Clark was at my house the day after the death. She did tell me it was Peter that did it. I played at Clark's after this. A black girl, named Caroline Dyer, was at the dance that night. Also Jim Callahan, a white lad.

John Carey. Norton boarded with me. He left my house in good health at about four or five o'clock that afternoon. The next morning I heard that he was murdered.

Cross-examined. He did not come back to my house after five o'clock. I had heard that he had left Lull's employ that day.

John Dixon. My house is in Richmond street, one door from the corner of Ann street. I was sitting up at my window, on account of a sick child. Heard a noise in Ann street. Looked out. Saw Norton standing alone on the sidewalk of Richmond street, near my door. He had nothing in his hand. He went down toward French Mary's. Two girls chased him up the street, and

then went back. One of them called him a son of a b—h. He went down a second time. They had blows there, but I could not see what was done. He ran up toward Forman's. York caught him at the corner. I saw York make two blows at him with his fist, toward the middle of the man's body. He got two blows from a stick. I could see no more, as the fence was in the way, except that he fell. One of the girls told Peter to give it to him. He got up and went past my house into Ann street. As he went he had his hand on his head, and said, "God have mercy on my soul." I did not see Norton strike any blow. He had nothing in his hand when he fell. After he rose he gave one of the girls a little push.

Cross-examined. I am an Irishman. I did not testify at the trial last summer. I did not tell anybody that I knew anything about this case. I was in the court-house during the trial last summer. I said nothing about my knowledge of the case. I knew Norton before this. He had traded with me. After Norton went into Ann street, I shut my window and went to bed. I made no inquiries. Did not hear of the murder until the next day. Had no suspicion that any one had been killed. When I first saw Norton he went down to French Mary's. He had nothing in his hand. The two girls came out and chased him. They went back to the house, and he went round the corner into Ann street, out of my sight. It was some minutes before he came again. When he came the second time he had a little white stick in his hand. York did not come out with the girls when they first chased him up. Norton had that stick in his hand when he went to the house the second time. Then he came back running, pursued by Peter and the girls. One of the girls was 'Liz Clark. Norton pushed her over into the street. It was after she had been pushed over that she told Peter to give it to him. One of the girls had a long stick. This was 'Liz Clark. The fence was in the way, and I could not see what was done in front of Forman's. After this I went to bed.

This concluded the evidence for the prosecution. The evidence for the defence was as follows.

Henry Forman, jr. (colored.) I am the adopted son of Henry Forman. His house is in Richmond street. It stands back from the street, and has a wooden platform before it. I was abed in the third story, and asleep. Was waked up by hearing bricks or stones thrown against the fence. Got up and looked out. It was clear moonlight. Saw a white man, Peter York and 'Liz Clark, close together. Sarah Mulliken was on the other side of

the street. Saw Peter throw something at the man. It missed him and hit the fence. 'Liz Clark struck at the man, and he struck her and threw her over a summerset into the street. She fell on her face in the middle of the street. She jumped up and said, "Give it to him, Peter York;" and struck him over the head with a stick. The man fell, got up, and ran towards Ann street. Peter and 'Liz Clark ran after him. Sarah Mulliken took no part in what was done. I went to bed again. I did not know that anything serious had happened until the next day. The man had a piece of white stick in his hand. There was a scuffle between him and Peter. The whole lasted about five minutes.

Cross-examined. The man stood near the fence, two or three feet from it. Peter struck him after 'Liz Clark struck him. The bricks seemed to be thrown against the fence. I did not see the man use the stick at all. He pushed 'Liz Clark with his hands. He pushed Peter with both his hands. I saw nothing in Peter's hand. The man seemed to be doing no more than was necessary to defend himself from attack. Peter had on a light sack.

William Johnson (colored.) I live in Richmond street, opposite Forman. Was sitting at my window, smoking. Saw 'Liz Clark, Sarah Mulliken, and Peter at the door of French Mary's house. Norton went down the street to the house. Peter asked him what he wanted. Did not hear the answer. Peter asked him again what he wanted, and told him to go away from there. He did not start, and they chased him up the street. He went into Ann street, and they went back to the house. In about ten minutes he came back. Had a stick in his hand about two feet long, and said, as he went down, "By Jesus, I'll have my revenge." When he came down Peter asked him what he wanted. They started after him, and overtook him at Forman's. Peter and the man were tustling. While they were tustling, Elizabeth Clark was putting in blows with the club she had in her fist. He shoved her partly into the street. She recovered and gave more blows. While they were tustling, a man came across and went near them. I do not know who he was. They then left off. Norton went to Ann street. The tustling was pretty much the same as though they were wrestling. No blows passed.

Cross-examined. 'Liz Clark had a club in her hand the first time she followed the man. When they overtook him he turned round and clenched. They both took hold, he and Peter. Did not see the man do anything with his stick.

Joseph Clash (colored.) Barber in Ann street. My house is

up the alley. Had a dance that night. I went down to the foot of the alley. Going down I met 'Liz Clark. She spoke to me. Asked me where Ben Dyer was. She seemed to be in a hurry. Went to the foot. Saw a man on the opposite side. Had no cap on. He came towards the alley and fell. As he fell, two brickbats fell from his hand. I thought he was drunk. Some one said he was hurt. People collected, and the watch came. Caroline Dyer stood by me at the foot of the alley. I did not see Gilmore there. He was playing at my house. No one was there when he fell, but Caroline Dyer and myself. Some people wanted to put the man inside the fence; others objected to moving him. Several said, "Let him be," or "Let him lie." Peter was not there when he fell. He came soon after. James Jordan and Callahan had a quarrel there, and Peter had something to say to them. I heard nothing said by Peter about giving him a blow, or having cut him in two, or anything of the sort. Seen Peter's knife often. He has had it many years. He always uses it, and cuts his nails with it. He often lends it. I have borrowed it of him.

Cross-examined. Know no particular reason why I went down the alley. Peter had on a light sack early in the evening. At this time he had on a gray sack and a cap. He denied having changed his clothes when he was examined in my house.

Caroline Dyer (colored.) Had been at Clash's dance. Came down the alley. Met 'Liz Clark going up. Passed her and went to the foot. Saw a man come across the street toward the foot of the alley with a brickbat in each hand. He raised one of them, and tried to throw it at me where I stood. As he raised his arm he fell, and the bricks dropped from his hand. Peter was not there when he fell. No one but Clash and I. Gilmore was not there. I went back to the house. When the dance broke up, I asked Peter to go home with me, as it was late and I lived at a distance. He did so. They all knew that he had gone home with me. It was no secret. After we got home, some one knocked at the entry door. Peter went out, and found the officers there. He gave himself up. He made no attempt to escape.

Cross-examined. It was after Peter had been examined the first time and released, that he went with me. As he went, he passed the body and the officers. Peter said nothing to me all the way home.

Sarah Mulliken (colored.) Am seventeen years of age. My mother lives in Garden street, but I lived then in the Black Seas. Had been at a dance-cellar in Ann street, near Keith's alley. As I came out, saw two white men sitting on the curb-stone. One of

them was Norton. Had never seen him before. He asked me if he might go home with me. I told him, no. He offered me two dollars. I went to French Mary's to get a dress. Peter and 'Liz Clark were at the door. Went into the back room, got the dress, and was coming out to go home. Heard Peter ask him what he wanted. He said he wanted to come in. Peter said he should not. He cursed and said he would. Peter had his arm up against the door sill. Norton pushed it down. Peter pushed him over. Pushed with his open hand. Norton sprung up and went up the street. 'Liz Clark and I followed him up a little way. We came back. In a few minutes Norton came down with a brickbat in each hand. He came toward Peter. Peter said, "My G—d, Mary, give me that bar." He saw Peter have the bar, and run. Peter followed, and overtook him at Forman's. 'Liz struck him with the bar. He caught her and flung her over on her face into the street. She fell flat. Norton then had a small stick in his hand. Somebody said, "Give it to him." He went into Ann street. 'Liz Clark went up the alley. Caroline Dyer stood at the end of the alley. Norton picked up two brickbats and went to the alley when 'Liz ran up, and tried to throw them at her. He thought Caroline Dyer was 'Liz Clark. As he raised the bricks he fell. Gilmore was not there then, nor Peter. The first words Norton said to me were, "Where are you going, nigger?" I said, "I am going home, sir." Then he asked to go with me, as I have said.

Cross-examined. Live at Black Martha's in the Black Seas. My mother did not know I was there. Peter had nothing in his hand when the man came. Did not expect the man to come back. 'Liz said she thought he would come back. 'Liz had the club. The man did nothing when Peter struck him. When Peter beat him he had nothing in his hand. 'Liz picked up the man's cap and ran up the alley.

Mrs. Abigail Cooper. (By the consent of both parties, HUBBARD J. read from his minutes at the last trial, the testimony of Mrs. Cooper, who was too ill to attend.) I am the wife of Mr. John Cooper who keeps a grocery in Ann street. Was sitting at my window, which is at the corner of Keith's Alley. Moonlight, my window open, and had a perfect view of the street and alley. Saw the black girls come running from Richmond street. One, named 'Liz Clark, ran up the alley. She seemed in a haste and flurried. The other, who was Sarah Mulliken, was less so. She did not go up the alley. A black girl, Caroline Dyer, stood at the foot of the alley. Also Joseph Clash came down the alley.

Just after the girls came round the corner, a white man followed. A man came after him with a stick. He struck at Norton. Don't know whether he hit him or not. Don't know whether that was the prisoner or not. He went away out of sight. The other man picked up brickbats or stones, and came towards the alley, and raised his arm to throw at the girl who stood there. He then fell, and the bricks dropped. Did not see the prisoner there until some time afterwards. No one was in the alley, or near there but Clash and Caroline Dyer, when the man fell. People began to gather. There was some talk about moving the body. There was a dispute and some hard words. Heard some one say, "Let him lie," or "let him die," I don't know which. Thought it was, "let him lie."

The counsel for the prisoner asked leave to introduce evidence to the effect that the deceased was a man of notoriously quarrelsome and fighting habits, and boasted of his powers as a fighter. This was objected to as irrelevant.

Dana, in support of the motion. The vital question here is, whether there was provocation and mutual combat. On this the whole case turns. There is a lack of satisfactory direct testimony to that point. It must be purely matter of inference. The jury are entitled to know every fact which can aid them in drawing a right inference. What more important than the well known character and fixed habits of one of the actors? Do we not so judge in all the affairs of life? In questions of self-defence, evidence of the size and strength of the deceased is admissible. In a doubtful case as to who commenced an assault, in the absence of direct testimony, if one party should be an elderly man of sedentary pursuits and peaceable habits, and the other a bully and prize-fighter, ought this to be kept from those who are to decide the question? If Norton was such a character, he carried such feelings and habits into this contest, this night. It becomes, as it were, a part of the *res gestæ*. The jury should know whom the prisoner was dealing with. This principle is recognized in the books. In *Regina* v. *Smith*, (8 C. & P. 168,) the report says, "Deceased was a person who boasted of his powers as a fighter." In *Queensbury* v. *The State*, (3 St. & Porter, 308,) the prisoner was allowed to prove that the deceased was one of a tribe of Indians who had a feud with the whites in that neighborhood, and were generally considered dangerous persons. In *State* v. *Tackett*, (1 Hawk. R. 210,) the point in question was distinctly ruled and fully considered by the court.

In indictments for rape, or for an assault with an intent, &c., the prisoner may show the general character and habits of the woman as a loose person. This is not to discredit her as a witness. It may be done where she is not a witness. The books put it expressly on a different footing. Greenl. Ev. § 54, Roscoe's Cr. Ev. 88, *Rex* v. *Clark*, (2 Starkie, 244,) 2 Stark. Ev. 365, 368. The question in such cases is, whether there was consent on her part. Her general character and habits are facts from which an inference may be drawn. In this case the question arises whether the deceased was a person likely to offer provocation or engage in mutual combat. In actions for malicious prosecution, the defendant may show the general bad character of the plaintiff, to rebut the presumption of malice. (2 Esp. 721. 4 Phil. Ev. 258. Addison's R. 246.)

Parker contended that the general character of the deceased was never in issue, nor that of the prisoner, unless he chose to put it in issue. The rule works both ways. The jury would like, perhaps, to know the general character of the prisoner, but the government could not prove it, though he has the benefit of the presumption of good character. If the evidence is admitted against the good character of the deceased, and not of the prisoner, the effect would be unfair. No such principle has ever been laid down in any text book, or in any reports in England or America, except in the cases cited. In those cases no authorities are given. General character must be inferred from the *res gestæ*. The analogy of rape does not hold. This is *sui generis*, and the evidence is admitted from policy and necessity, because there is usually no evidence as to the fact but from the woman, and the evidence as to her character is partly discreditory and partly to the issue. The crime is easily charged, and difficult of disproof.

Phillips replied, and contended that the reason why evidence is not received against the general character of a prisoner, is because he is on trial. It is the privilege of an accused person, from public policy. In rape the books say expressly that the evidence is not on the ground of its being discreditory. We do not ask to prove particular previous acts, but the well known habits, pursuits, and character of deceased. We do not contend that the general character of the deceased is always in issue. We ask the court to go no further than a case where direct testimony is wanting, or unsatisfactory, or conflicting, and the *factum probandum* is to be inferred by probable reasoning.

The Chief Justice pronounced the decision of the court. The general rule unquestionably is, that the general character of neither

party can be shown in evidence on trials for homicide. The prisoner has the personal privilege of showing his good character; but unless he puts it in issue it is not so. The government cannot prove either quarrelsome habits in the prisoner, or peaceable habits in the deceased. There is no limit if we go beyond the *res gestæ*. The only exception is in rape. This is partly because the woman is a witness, and partly from policy and necessity, as the only protection of the accused. In the case from Car. & Payne, we think the expression probably arose from boasts made by the deceased at the time, and proved as parts of the *res gestæ*. The cases from Hawk. and from Stew. & Porter stand alone, and are not of such authority as to require us to leave the established course of practice.

The evidence for the prisoner here closed.

Hubbard J. charged the jury. The prisoner is charged with the felonious killing of the deceased. The jury must first be satisfied that Norton came to his death by the act of some person, and not by natural causes. If satisfied of that, they must then be satisfied that the person who caused his death was the prisoner at the bar. If the jury entertained a reasonable and substantial doubt on either of these points, they must acquit the prisoner. If, however, they were satisfied that the prisoner, by his act, took the life of the deceased, then the homicide, as it is technically called, is made out. Homicide is the killing of a human being. This killing may be criminal in the eye of the law, or it may not. Homicides not criminal, are either justifiable or excusable. They are justifiable when done by warrant of law, as by soldiers in time of war, or when a sheriff takes life by warrant for the execution of a malefactor. They are excusable, when done in self-defence, or by accident, without fault of the prisoner. There has been no suggestion of accident here, nor of self-defence. Yet, if you are satisfied that the prisoner was compelled to the act, as, if he did it to save himself from death or great and impending bodily harm, after having retreated and made every effort to avoid the danger, you will acquit him. If you find that he committed the homicide, and do not see reason to be satisfied that he did it by accident or in self-defence, then the killing is felonious, and you are to see what is the nature of the crime. The prisoner relies upon extenuating circumstances to reduce the crime from murder to manslaughter. This it is incumbent on him to do. The circumstances contended for are provocation and mutual combat, both or either. Mere words are not a legal extenuation for homicide. There must be

some act of indignity, or rudeness or violence upon the prisoner. If, upon receiving such provocation, instantly, without time for reflection or the cooling of the blood, life is taken, the law pays that regard to human infirmity as to extenuate the offence. So, if a mutual combat is engaged in, without unfair advantage taken, and the blood heats with the blows, and life is taken instantly, without time for reflection or the cooling of blood, then it is manslaughter. But it must appear that there was no previous malice, and no unfair advantage. It must be a mutual combat, and not a mere attack and defence, and the deed must be done immediately, under that temporary suspension of reason which occurs in such cases.

The malice that constitutes murder may be express, or may be implied from the circumstances. It is not confined to previous ill-will. The act may be sudden, and the intent formed just before the deed, yet malice will be implied in the absence of proof of sufficient provocation, or from any circumstances of unusual cruelty. Manslaughter is not inconsistent with the use of a deadly weapon. The nature of the weapon, the manner of using it, the mode of procuring it, are all circumstances from which presumptions of fact, and not of law arise. It is however a general presumption that a party contemplates the effects of his own act, and that death may ensue from the use of a deadly weapon. When it is said that the prisoner must prove the extenuating circumstances, it is not meant that the testimony must be offered by him. It may come from either side. The jury are to be satisfied of the extenuating circumstances from all the evidence, from whichever side it comes.

Such was substantially the law, as laid down by his honor. He then commented carefully upon the evidence, as to the homicide, as to the provocation set up, and as to the nature of the collision between the parties in front of Forman's house, also, as to the language attributed to the prisoner after the act.

The jury received the case at about half past five o'clock. The court retired to the lobby, and the counsel and a large concourse of spectators remained in the court room. At a little before nine o'clock the jury came in. It was nearly a quarter of an hour after, before the court appeared, though they were in the next room. It was then ascertained that they had been for a considerable time engaged in the discussion and preparation of an answer to a question sent to them by the jury. Hubbard, J. then read to the jury the following paper, understood to have been drawn up by the chief

justice, as the instructions of the court. "The question put by the jury is as follows — 'Were the jury instructed by the court that the prisoner was to prove provocation, or mutual combat, and was not to have the benefit of any doubts upon the subject?' It is hardly possible to give a direct answer, affirmative or negative, to the question of the jury, without some explanation. The rule of law is, when the fact of killing is proved to have been committed by the accused, and nothing further is shown, the presumption of law is that it is malicious, and an act of murder. It follows, therefore, that, in such cases, the proof of matter of excuse or extenuation lies on the accused, and this may appear, either from evidence adduced by the prosecution, or evidence offered by the defendant. But where there is any evidence, tending to show excuse or extenuation, it is for the jury to draw the proper inferences of fact from the whole evidence, and decide the fact on which the excuse or extenuation depends, according to the preponderance of evidence. Where there is evidence on both sides, it is hardly possible to imagine a case in which there will not be a preponderance of proof one side or the other. But if the case or the evidence should be, *in equilibrio*, the presumption of innocence will turn the scale in favor of the accused, that is, in a case like the present, in favor of the lesser offence. But if the evidence, in the opinion of the jury, does not leave the case equally balanced, then it is to be decided according to its preponderance."

After receiving this instruction the jury retired, and soon returned with a verdict of Guilty of Murder.

MOTION FOR A NEW TRIAL.

The prisoner's counsel presented a motion for a new trial, upon the following grounds: "Inasmuch as when the jury inquired of the court whether the prisoner must prove the provocation or mutual combat, or whether he was to have the benefit of doubts on that subject, the court instructed the jury that when the fact of killing is proved to have been committed by the accused, and there is any evidence tending to show excuse or extenuation, the verdict should be for murder, unless there was a preponderance of proof in favor of the matter of extenuation or excuse, or at least an equilibrium of proof on that point."

Dana, in support of the motion. The general rule in criminal cases is, that the guilt of the accused must be proved beyond a reasonable doubt. If the instructions are correct, the case of homicide is an anomaly. It has always been held in this commonwealth, in other cases, that in criminal trials the burden of

proof never shifts. *Commonwealth* v. *Kimball*, (24 Pick. 373); *Commonwealth* v. *Dana*, (2 Metcalf, 329.) In one of these cases the ruling of the court below was reversed for the error of confounding the making out of a *primâ facie* case with the shifting of the burden of proof. And in the latter case it was distinctly held that the burden of proof does not shift.

In murder, malice is the essence of the indictment. Reasonable doubts on the essence of the crime, in whatever stage they arise, must enure to the benefit of the accused. It is contended that homicide is an exception to the general rule; and that the law attaches a presumption of malice to the fact of killing.

A presumption that every homicide is murder is purely an artificial presumption. It is contrary to fact and experience; for of all the homicides committed, while some are justifiable, and some excusable, of those which are criminal, how few are murder? It is a presumption against reason, and knowledge of human nature. It is a presumption against life and liberty and the rights of the accused. It is admitted to be an exception to the whole current of criminal law. It is contrary to the evident policy of our constitution, which provides that the jury, in criminal cases, shall be judges both of law and fact. Here they are not even allowed to be judges of fact, but a fact is given to them with an artificial weight attached to it, by the law, which they are not at liberty to disregard. The prisoner is entitled to an unbiased moral conviction of his guilt, which in this trial he has not had. We must be sure that this rule is well founded in judicial decisions. A great deal of loose language has passed through the text books, like the following: "it is incumbent on the prisoner," "the prisoner must show," "the burden is on the prisoner," &c., but we doubt if an adjudged case can be found where it has been unequivocally decided that the presumption of law will warrant a conviction for murder, where there is evidence tending to show extenuation, and sufficient to raise reasonable and substantial doubts in the minds of the jury.

The history of the law of homicide accounts for the rise and tradition of a good deal of this general language. Formerly, if the homicide was proved, a verdict of murder was rendered, and if there were circumstances of excuse, a pardon was sued out, as of course. In a much later period, the punishment for murder and manslaughter was the same. Even after the degree of punishment was altered, the verdict was for murder, with a recommendation for commutation. (4 Bl. Com. 188; Russ. on Cr. 718.) A separate verdict for manslaughter was new in Blackstone's time.

The 2 N. Y. Rev. Stat. 667, authorize an acquittal where the homicide is proved, but is not felonious. This course of proceeding is recent. When the verdict and punishment were the same, there was little need of strictness in the distinctions. It was enough to know that if the killing was proved, the party was to be convicted generally. The language has survived its application. The true meaning of the maxim is, that in the absence of all other testimony the presumption of law must be resorted to. But if there be any substantial testimony, however it may arise, tending to show the character of the act, the presumption of law cannot be used. The government must prove the malice, as much as any other part of the indictment, and proof of homicide *satisfies* this burden of proof, in the absence of other evidence, but does not *shift* it. After all, the jury must try the indictment as a single proposition, — was it or not a malicious killing? The instructions savor too much of special pleading. The prisoner is treated as though he had set up a special plea in confession and avoidance, which he must prove. It cuts the case up into parts, and the conviction or acquittal depends upon the state of the technical presumptions. If reasonable doubts arise in one stage of the case, he has the benefit of them, if in another he has not, though that be the essence of the case. This verges upon an artificial conviction. The true nature and use of legal presumptions in criminal cases, with their limitations, are well explained in the following passages, Best on Presumptions, pp. 18, 43, 208, 259 and 308; in Wills on Circ. Ev. 29; and nowhere better than in the passage from Burke, quoted by Wills.

A good argument against the instruction, is furnished from the fact that the court is obliged to make a new rule, — the rule of preponderance and equilibrium. These words are nowhere to be found in the whole range of criminal law. Best on Pr. 257. We appeal to the court and to the learned counsel for the government to know if there is any trace of a rule of preponderance in criminal cases. The court is driven to invent the rule to meet the evident injustice of following out the supposed principle. In *Commonwealth* v. *Abner Rogers*, decided within a year, there is the only trace of the new rule. But then the plea was insanity. The act was admitted to be murder, unless the prisoner was insane. The burden might lie on him to show his insanity, without affecting this case, because; 1st, insanity is an independent, substantial fact, somewhat in the nature of confession and avoidance; 2d, the presumption of fact and experience is against insanity, inasmuch as most men are sane, (Best on Pr. 57;) and 3d, there is a reason

from public policy, for examining strictly into such a plea, and requiring preponderating evidence of it.

A presumption of law in a criminal case is, at most, but a substitute for facts. But here the presumption of law is stronger than the presumption from facts would be. Convictions would be better secured in cases like the present, by proving nothing but the fact of the killing, and leaving to the prisoner the risk and chance of being able to show, by eye-witnesses, the true character of the transaction.

Even if the language in the courts is adhered to, and the proof of homicide may be said to throw the burden of proof upon the accused, we ask what burden does it throw upon him? The prisoner's burden. The only burden a prisoner ever can have put upon him, that of satisfying the jury that there are reasonable and substantial doubts as to his guilt. If the criminal law ever speaks of the burden being on the prisoner, it means that burden, and no greater. It is when he is in suspicious circumstances, that he needs the aid of the presumption of innocence. And it is here that it forsakes him. When he is involved in a calamitous issue, entangled in the net of circumstances which are not always easy to be explained — when he stands alone — the COMMONWEALTH against *Peter York* — then he is deserted by the law, and its hard, artificial intendments are turned against him.

Parker, against the motion, stated, that on account of his numerous engagements the last week, he had not prepared a full argument on this point; but he could not believe that the court would see cause so soon to reverse its own decision, deliberately made. So far from the prisoner having reason to complain of the ruling of the court, the only objection to it was that the court had bent the law to favor the prisoner. The rule he had always supposed to be, without dispute, that when the homicide is proved, the burden is on the prisoner to prove the circumstances of excuse or extenuation. Now the meaning of this is the same in all cases. He must prove them — prove them to the satisfaction of the jury. The court have, in tenderness to the prisoner, made a new rule, that he need only create a preponderance or an equilibrium. He admitted that this is a rule not to be found in the books. But it is laid down in Rogers's case, and it was not for the prisoner to object to it.

To the point, that proof of the killing shifts the burden of proof, he cited Foster's Cr. Law, 255; 1 East, P. C. 106; Kelyng's R. 27; 9 Coke, 676; *Rex* v. *Oneby*, (2 Ld. Raym. 1485); also, *Commonwealth* v. *J. J. Knapp*, (10 Pick. 477); where it was

ruled, that in the trial of an accessory, if the record of the conviction of the principal is produced, the burden is on the prisoner to disprove the guilt of the principal.

Phillips replied. He examined the authorities cited by Mr. Parker, and argued that they were chiefly general and loose language, of the kind described in the opening, which had originated in early and arbitrary times, and had been passed from hand to hand with little examination, but contended that no adjudged case necessarily decided the point. The case in 10 Pick. is not applicable, in full. The record was conclusive that the principal was convicted. It was further held to be satisfactory evidence that the person convicted was a principal in the act, and that the burden was on the accessory to disprove that. But it was not so held to affect the question, whether the act was murder, or a less offence, and did not touch the participation of the prisoner as accessory.

Upon the conclusion of the arguments, the court, after a brief consultation, remanded the prisoner, and said they should take time to advise before the judgment. After an interval of about six weeks, during which it was generally understood that the court gave long and careful attention to the subject, the opinions were pronounced as follows. Judge Dewey had in the mean time returned from his circuit, and joined in the opinion pronounced.

Shaw, C. J.[1] Motions for a new trial in capital cases are of rare occurrence, and as such cases are by law tried before a full bench, cannot be considered as motions of course, and, if allowable at all, must be so only on occasions of real difficulty and importance. In this case, the instructions were necessarily given without much time or opportunity for consultation and examination of authorities, and being a question of great delicacy and importance, the court was very willing to reconsider the subject, with the aid of the arguments at the bar, and a full and deliberate examination of authorities. It is matter of unfeigned regret, that, in a question of such magnitude, the members of the court have not been able to come to a unanimous opinion. It is my duty to state the opinion of the majority.

Murder is homicide with malice aforethought. As one argument in favor of the motion is, that the presumption of this "malice

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[1] The opinions are not given here in the very words or order used by the learned judges, but are prepared in a condensed form, by a member of the bar, from the manuscript opinions of the court.

aforethought" from the fact of killing is arbitrary, artificial, and against reason and experience, it is proper to consider what the thing presumed is; in other words, what is legal malice aforethought? Beside the word aforethought, the books use other words as defining the crime of murder, to wit, deliberate, *sedato animo*, &c. But none of these phrases require that the intent should exist long beforehand. However short the interval, the intent necessarily precedes the act, and if the act is in pursuance of the intent, it is prepense or aforethought. As, when a mortal blow is given with a deadly weapon immediately upon mere words of provocation. This is murder, words not being a sufficient provocation in law, however soon the blow followed the words; so rapidly does the mind form its purposes, and so immediately does the hand execute them. In Pennsylvania, where by statute "premeditation" constitutes murder in the first degree, it has been repeatedly held, that the intent, however immediately executed, is the true criterion. (4 Dall. 146, Addis. 257, &c.) The word malice, too, must not be taken in its popular sense of malignity, hatred, or ill-will. In law it is applied to a wrongful act done *malo animo*, that is, with a wicked intention. It is no more than the wilful doing of an injurious act without lawful excuse. *Bromage* v. *Prosser*, (4 B. & Cr. 247); *Wills* v. *Noyes*, (12 Pick. 324); 4 Starkie Ev. 903. Also, it is a well settled principle, that every person must be held to intend the natural consequences of his own act. If, therefore, a man does an act knowingly, the natural consequence of which is to take the life of another, he must be presumed to have intended so to do. Taking then these maxims and terms, with their proper definitions, we find it is not an arbitrary and artificial rule, to infer malice from the wilful doing of an act likely to cause death, without evidence of justification or excuse, but a natural and necessary inference of fact.

There may be a class of cases, where, if reasonable doubt arises as to the malice, the court would properly instruct the jury to find manslaughter. As where a mother exposed her infant child in a garden, and it was killed by a kite; or where overseers of the poor shifted a pauper from parish to parish, until he died of exposure and hunger; or where a son wantonly exposed a sick father to the cold; or where a man wantonly threw a heavy piece of timber from a house into the street of a populous town. But in such cases there is no intention to take life, and the question whether it be murder or manslaughter, must depend on the degree of carelessness, cruelty, or malignity presented by the evidence, and is an inference of fact from all the circumstances. But the case to which

the rule we are now considering was applied, is one, where the life of the deceased has been taken by the accused, by a voluntary act, a wound inflicted with great violence, with a deadly weapon, and upon a vital part. The inferring of a malicious intent to kill from such an act, is placed by the text writers among natural and necessary presumptions of reason and experience. (4 Stark. Ev. 9; 3 Greenl. Ev. p. 18.)

Let us examine into the authority for the rule for the presumption of malice. In Foster's Cr. L. 255, it is said, "the fact of killing being first proved, all the circumstances of accident, infirmity, &c. are to be satisfactorily proved by the prisoner, &c." This, though high authority, not being a judicial decision, we trace it to an earlier source. In *Macalley's case*, (9 Co. 676,) it was decided by all the judges and barons, upon great consideration, that if one kills another without provocation, and without any malice prepense that can be proved, it is murder. This case is put as of one of killing without provocation, but I think this evidently means where no provocation is proved. This is established by *Legge's case*, (Kelyng, 27,) where it was held that if one kill another, and no quarrel appear, it is murder, and it lieth on the accused to prove the quarrel. In *Oneby's case*, (2 Ld. Ray. 1485,) which was a special verdict, it was objected that the killing was in a sudden quarrel, but the court said the law will not presume it to have been in a quarrel unless that is proved, and referred to *Legge's case*.

Another reason for holding this opinion is drawn from the judgments rendered on special verdicts. In these verdicts it is believed that the jury never found in terms either that there was or was not malice, or that there was or was not sufficient provocation, but the court were judges of the malice and of the extenuation from the facts found. (*Oneby's case*, *Mawgridge's case*, *Hollowy's case*, (Palmer, 545,) and *Legge's case*, cited.) It is equally well settled that if the facts found are not sufficient to prove the accused guilty of murder, the court will take nothing against him by intendment, but presume him not guilty. If the fact of killing is found, and the jury neither find nor negative the extenuation, nor find the malice in terms, the judgment of murder must be on the presumption that in the absence of proof of provocation, the killing was malicious. And the jury do not return any facts but those proved, that is, proved, of course, to their satisfaction. The practice of the court in the cases above referred to seems to establish the rule that in the absence of circumstances of extenuation proved to the satisfaction of the jury, the court is obliged to render judg-

ment for murder, if a homicide, neither justified nor excused, is proved to the satisfaction of the jury.

It is objected that by our ruling the prisoner may be convicted of murder, although the jury entertain reasonable doubts of the malice. But it is the guilt of the accused, which is to be proved beyond a reasonable doubt, and in the view we take of the law, the guilt is so proved by proof of the act of voluntary killing, without excuse or justification apparent upon the evidence offered in support of the prosecution. The maxim of the law in favor of innocence is not, then, violated. If this had been a special verdict, and the jury had found a voluntary killing, with a deadly weapon, violently used, and returned that there was evidence tending to show provocation, but that the proof of the provocation did not preponderate over the proof against it, nor balance it, though it was enough to raise reasonable doubts, we should have considered the extenuating circumstances as not proved, and the judgment would be for the greater offence. *In favorem vitæ*, we allowed a preponderance, the rule in civil cases, to be the measurement of proof of facts in favor of the accused. The ruling as to the equilibrium may deserve a further consideration when it shall again arise, but the accused cannot object to it, as it is in his favor.

Besides the authorities cited to the point of the presumption of malice from the killing, we may add others in which it has been recognized. Hale, P. C. 455; 4 Hawk. P. C. B. 1, c. 31, § 2; 4 Bl. Com. 206; 1 East, P. C. c. 5, § 12; 1 Russ. on Cr. 422, 3; 8 C. & P. 116; ibid. 35; Rosc. Cr. Ev. 20; 4 St. Ev. 964; Parker, Ch. J. in *Commonwealth* v. *Phillips*, 1817. Also 9 Pick. 496, and 10 ibid. 484, are to the point that the burden may be thrown upon the accused to rebut a presumption of guilt, by satisfactory evidence, and that it is not enough to bring the fact into question.

It was understood that Hubbard and Dewey, justices, concurred in this opinion.

Wilde J. delivered a dissenting opinion. After a most careful and anxious consideration of this subject, I cannot concur in the opinion of my learned associates; and in a question so important, I feel bound to state the principles upon which my own opinion is formed. In my judgment, the question entirely depends on the rule of law as to the burden of proof. If the burden of proof was throughout the trial on the commonwealth, then the instructions to the jury were incorrect. If, on the contrary, the burden of proof was on the prisoner, he has no cause of complaint, as the instructions were more favorable than the law required.

It is unnecessary to cite authorities to the point that the crime charged must be proved beyond a reasonable doubt. A *primâ facie* case, in civil causes, may shift the burden of proof, or it may not. But in criminal trials, this burden can rarely shift; probably never in trials on the general issue. If the accused pleads a pardon, or a former conviction, he has the burden; but if he relies on facts tending in any way to disprove any fact in the indictment essential to the crime, the burden is still on the government. As in the case of an *alibi;* it may be clearly proved that the crime charged was committed by some person, and witnesses swear that that person was the prisoner, and their testimony alone is satisfactory, yet, if he brings witnesses equally credible to swear that he was in another place at that time, and the fact is left in reasonable doubt, the defendant cannot be convicted. The burden was still on the government. It has been sufficiently considered and decided in cases not of homicide, as in *Commonwealth* v. *Dana*, (2 Metc. 240,) that the burden is on the government to satisfy the jury beyond a reasonable doubt, upon all the evidence, whatever may be a *primâ facie* case. So in *Powers* v. *Russell*, (13 Pick. 67.) It is admitted by the district attorney that the government must prove the main facts of the indictment beyond a reasonable doubt; but he contends that if the homicide is proved upon the prisoner, the burden is shifted by the operation of a presumption of law that every homicide is murder. If it is so shifted, the case of homicide is an anomaly in the criminal law. A presumption that every killing is murder rather than manslaughter is against common sense and experience. Judging from experience and knowledge of human nature, we should rather infer, before hearing the testimony, that there must have been some adequate provocation, or the heat of mutual combat, to account for a killing. At least, the mere homicide leads to no just inference as to one degree of criminality rather than the other.

If the presumption ever was a rule of law, it arose in early and barbarous times, when the rights of the accused were few and ill secured, and the rules as to evidence were arbitrary and irregular. It has nowhere been a subject of discussion in the books, and we apprehend that no decision of later times can be found to support it. The dicta relied upon from the books are taken from cases of special verdicts, where the question of the burden of proof did not and could not arise. The earliest case is that in Kelyng, which is on a special verdict. So in *Oneby's* case, the court refer to Kelyng. In this case it was held that the jury were to find the facts, and the court to judge of the malice or extenuation. And so it was for a

long time considered, and the decisions were on special verdicts. The question of malice or not did not present itself to the jury. Yet the few dicta in these cases are the foundation of the language handed down in the books. Now, the jury are to judge of the malice upon the evidence itself, and not by presumptions of law applied to it. If they had found a special verdict in this case, it would have been that the homicide was proved, but that as to whether it was of malice or in heat of blood, they entertained reasonable doubts upon the evidence, though the preponderance of proof was that it was malice. Could the court, upon such a verdict, have passed sentence of death? Clearly not, because a material fact, characteristic of the crime, was not sufficiently proved.

There is another view of the origin of this supposed presumption. Murder, according to Blackstone, was originally applied only to secret killing, as its derivation denotes. It was made a distinct crime by Canute, to prevent the secret assassinations of his countrymen by the English. It was continued, for a like purpose, by William the Conqueror, in behalf of his Normans. So it continued until the Stat. 14 Ed. III. ch. 4, by which the difference between secret and open homicides was abolished. The ground of the presumption, if any good ground ev r existed, was then taken away. Why text-writers have not traced the maxim to its source, is certainly very remarkable. But it has never been a subject of discussion, nor have any modern cases been decided upon it, that I can find.

Blackstone says, that every homicide is presumed to be malicious until the contrary appeareth, and cites Foster. But Foster only cites *Oneby's* case, in which is only a dictum, and a reference to a similar dictum in Kelyng. These dicta were in cases of special verdicts, as we have seen. In East there is a reference to Foster and to Lord Hale; but Hale does not support the presumption in question. He speaks only of a killing without provocation, or by poison, which is deliberate and cannot be extenuated. Coke, in 3d Inst., says that malice is implied when one killeth another without provocation, or by poison. Neither Coke nor Hale give countenance to the presumption contended for. The case in 8 C. & P. 35, was one of secret killing, where the prisoner offered no evidence whatever to explain the circumstances. But in the same volume, p. 15, Park J. lays down a rule, the reverse of the one contended for, namely, that the homicide fixed on the prisoner may be manslaughter or murder, as it may turn out in the evidence, unless the prisoner shows it to have been excusable.

In my judgment, the following positions may be maintained.

1. The presumption of malice from the mere fact of killing, is arbitrary and unreasonable, and had its origin in a barbarous state of the criminal law. 2. If it ever justly applied, it was only to secret homicides, as open homicides were not murder, until 14 Edw. III. It cannot be extended to homicides committed in presence of witnesses. In such cases the jury decide whether it is done in malice or in hot blood, according to the facts before them, and must not give a verdict for malice, unless satisfied that it was of malice. If the presumption of law is applied, the only material fact is the killing; and the weapon used, the manner of the act, and all the circumstances become wholly immaterial. Evidence as to them need only come from the prisoner at his risk and peril. This cannot be. 3. If there ever was any such presumption — and it appears upon examination that there is reasonable doubt whether the presumption is well founded — the prisoner cannot be convicted, especially on a presumption so unreasonable, and so dangerous to life. 4. The burden is on the government to prove the crime charged, and that beyond a reasonable doubt. Especially should this rule apply in capital trials, where the specific fact to be proved is malicious killing; and where nothing ought to justify the sentence of death, but an unbiased moral conviction of the prisoner's guilt of that specific crime. 5. There is no principle or authority in criminal law justifying a conviction on preponderating evidence, unless it removes every reasonable and substantial doubt.

I reluctantly assented to the instructions, relying, but with some suspicion, on the language of the text-writers. It was the same with me in Rogers's case; but the verdict was there for the prisoner. I think the jury should have been instructed that, upon all the evidence, they should be satisfied, beyond a reasonable doubt, that the killing was of malice. There is no presumption from the mere fact of killing, that the homicide was malicious rather than from provocation. If there be any, it applies only to secret killing, and not to the case at bar, where there were eye-witnesses to the manner and circumstances of the act. I think, therefore, that a new trial should be granted.

The prisoner was then again remanded, and on the 6th day of February last the sentence of death was passed upon him by the chief justice; to be executed at such time as the governor should order. Wilde, J. was not present when sentence was passed.

Recent American Decisions.

District Court of the United States, Massachusetts, December, 1844, *at Boston. In Admiralty.*

JONES, AND ANOTHER. *v.* THE WRECK OF THE MASSASOIT.

In case of shipwreck, seamen are entitled to wages, as such, if by their exertions remnants of the vessel to the amount of the wages are saved, although no freight be earned.

If, after a vessel is cast on shore, the owner appear with a competent force, supersedes the officers, and takes the business of salvage out of the hands of the seamen, and neither affords them subsistence nor desires their aid, they being willing to render it, they may recover wages in a suit *in rem* against the remnants of the vessel.

THIS was a libel for wages in a voyage from Calcutta to Boston. The facts sufficiently appear in the opinion delivered by

SPRAGUE, J. If no freight was earned the first question is whether in case of shipwreck and total loss of freight, but parts of the vessel being saved by the exertions of the crew, the seamen are entitled to wages. When the early editions of Abbott on Shipping were published, there had been no decision on this point in England. (Abbott on Shipping, 3d edition, p. 435.)

In the American courts it has been settled, by a series of decisions commencing at an early date, that in such case the seamen are entitled to compensation. Should that compensation be wages under the contract? This was opposed to the maxim, that "freight is the mother of wages," which the courts were not prepared directly to encounter. Should the compensation be salvage? Salvors are mere volunteers, and very liberal compensation is awarded to them, in order to invite their exertions and secure their fidelity in the laborious and oftentimes perilous service of rescuing and preserving wrecked property. Shall then seamen be absolved from the obligations of their contract, and from all duty of obedience to their officers, at the moment when their services may be most needed, for the protection of the property of the owners? Shall they be at liberty, at such a time, to divest

themselves at once of their allegiance to the ship, and of the character of covenanted seamen, and assume, at their option, the character of salvors, claiming its large rewards and subject to no control? This would not only be inconsistent with the contract of hiring, but a startling violation of that principle of maritime policy which sedulously endeavors to bind up the interest of the mariner with that of the owner. It would be not only an inducement to relax his efforts in time of difficulty and danger, but a direct temptation to cause shipwreck and disaster, that he might successfully claim the large rewards of salvage service.

There may, indeed, be cases in which seamen may become salvors of their own vessel, as stated by Lord Stowell in the *Neptune*, (1 Hag. 227, 237); and by Mr. Justice Story more liberally, in the *Two Catherines*, (2 Mason, 319); and as in the *Blaireau*, (2 Cranch, 240, 269, 270); although that was against the judgment of that able jurist, Mr. Justice Washington, as appears in the *Cato*, (1 Peters Ad. R. 61, 62.) But seamen can properly become salvors only in very extraordinary cases, where the services rendered are without the range of their contract, and therefore voluntary. Of such we are not now speaking.

The objections to seamen becoming salvors, in ordinary cases of shipwreck, are so formidable that the idea could not be entertained, and it was decided that they were still held by their contract and bound to continued exertions to save their ship, her tackle, apparel, and fragments. That for such laborious and hazardous service, when successfully performed, he should receive some reward, no one was bold enough to deny. It could not be salvage, for the insurmountable objections already stated. Should it be a *quantum meruit?* That was incompatible with the idea, that the service was rendered under a contract prescribing the rate of compensation, and was obnoxious, in a great degree, to the objections which excluded salvage.

Holding, as the courts generally did, and upon the strongest reasons, that the seaman was still serving under the obligation of his contract, the plain principle would seem to be that his compensation should be that which the contract prescribed. And this was the practical result to which they in fact generally came, although they did not see fit to give it the name of wages. They have called it sometimes salvage measured by the stipulated wages, sometimes *quasi* salvage, or wages in the nature of salvage. But the compensation actually given was the contract wages, neither more nor less; and this, too, whether the voyage had been long or short, the amount large or small, or the service

at the time of the shipwreck great or trifling. It had not one quality of salvage, excepting that something must be saved. It was not for voluntary but for covenanted service. It was not enhanced by peril and gallantry, nor diminished by the object being easily and safely accomplished. It was not affected by the value of the property saved, provided it was not less than the amount of the wages. It might exhaust the whole remnants, where there had been little either of peril or labor; or it might not take a hundredth part, where both had been great. Decisions of Judge Winchester, reported in a note in 1 Peters Ad. R. 194, 195; *Frothingham* v. *Prince*, (3 Mass. 563,) more fully reported in 2 Dane Ab. 462; *The Catherina Maria*, (2 Peters Ad. R. 424); and note to p. 427, which states what was the ultimate decree in *The Cato*, (1 Peters Ad. 48, 68, 69); *The Cynthia*, (2 Peters Ad. R. 204, 209); *The Harmony*, (1 Peters Ad. R. 79,) a remark *arguendo*; *Coffin* v. *Storer*, (5 M. R. 253, 254,) a *dictum*; *The Two Catherines*, (2 Mason, 319, 337, 340); *The Sophia*, (Gilpin R. 77, 79, 80, 82); *The Hercules*, (Ibid. 188.) In *Dennett* v. *Tomhagen*, (3 John. R. 156,) the court, by Kent, C. J., considers the compensation that should be awarded to be salvage; and the same opinion is expressed in 3 Kent Com. 195.

It will be seen by these cases, that while judges and jurists were really carving out a new exception from the general rule, that makes the earning of freight a prerequisite to the recovery of wages, they had the fear of the maxim that "freight is the mother of wages," before their eyes, and sought to propitiate it by a misnomer. That maxim is probably indebted to the concise figure of speech in which it is conveyed for something of its force and acceptance, for, as observed by Lord Stowell in *The Neptune*, it is not strictly accurate. Wages are the legitimate offspring of the mariner's contract united with its performance, — cut off indeed sometimes by the stern decrees of maritime policy seeking to unite the interest of the mariner with that of the owner.

Chancellor Kent, in 3 Johns. and in his Commentaries above cited, expressed dissatisfaction with this equivocal state of judicial opinion, in which the language of the courts vibrated between wages and salvage, and to escape from it he adopted the greater evil of considering that the reward should be strictly and merely salvage. Mr. Justice Story, in *The Two Catherines*, (2 Mason, 334,) says, "If the question were entirely new, it might, perhaps, be more consistent with the principle of the rule, that the earning of wages shall depend on the earning of freight, to hold that the

case of shipwreck constituted an exception from the rule, and that the claim to wages was fully supported by the maritime policy, on which the rule itself rests."

What was thus clearly indicated in 1821 as the most proper course, and which Judge Story would evidently have pursued, but for the influence of previous opinions pronounced by others, was fully adopted by Lord Stowell in *The Neptune*, (1 Hag. 227.) The case was this. A British vessel was wrecked on the coast of France and the freight totally lost, but by the exertions of the crew parts of the vessel were saved and sold by the captain who was also the owner. After their return to England the seamen instituted a suit *in personam* in the admiralty against the owner for wages. The libel or petition contained no claim for salvage or *quasi* salvage services. Lord Stowell, after full investigation, in an elaborate judgment sustained the naked claim for wages as such, distinctly announcing it as an exception to the rule which makes wages to depend on freight. This is evidently approved by the American editor of Abbott on Shipping, (4th American edition, p. 452); and again by the same high authority, in *Pitman* v. *Hooper*, (3 Sum. 60); and we may now, with that directness which should characterize courts of justice, give to the established practice in this country its true designation and say that in such cases wages, as such, are recoverable.

The result of the authorities and the true doctrine are well stated in Curtis's Rights and Duties of American Seamen (p. 285 to 290) where the learning on this subject is collected.

But it is contended that in the case now before the court the seamen did not save the remnants of the vessel, that they were preserved by other agency, and that this distinguishes the present from all cases in which compensation has been allowed and ranges it with that of *Lewis* v. *Elizabeth & Jane*, (Ware, 46.)

What are the facts? The ship Massasoit, on a voyage from Calcutta to Boston, went ashore in a storm, on the night of Wednesday, the 11th of December last, on Point Alderton, at the mouth of Boston harbor. The crew remained on the wreck performing all their duties until they were taken off by a life boat, barely escaping with their lives, about three o'clock in the afternoon of Thursday. Previous to this the owners had received information of the disaster, and at the time when the seamen were landed, the agent of the owners arrived with a steamboat from Boston, for the purpose of saving the remnants of the vessel and cargo. From that time the captain gave up all control to the agent. The crew were in a suffering condition and physically unable to perform any labor during the

residue of Thursday. On Friday some of them were still too feeble to do anything; the others went upon the beach, near the wreck, and rendered some trifling service by throwing out of the reach of the sea a few sheets of copper that had been torn by the waves from the bottom of the ship. The agent continued to labor in saving the wreck until Tuesday following, and then contracted with certain persons to take up the cables and anchors when the sea should become smoother; which was done in the succeeding week. Neither the agent of the owners nor the officers of the ship furnished the seamen with any means of subsistence, or called on them for any service, nor indicated in any manner that their aid was desired.

The seamen never formally tendered their services, but no disinclination was manifested on their part to perform whatever services might be required of them. They remained, supported by charity, near the wreck, their presence and condition being known to the agent and officers, until Saturday, when they went to Boston.

The admiralty requires no vain or nugatory acts, and a formal and express offer of service was not necessary. Had the agent desired their aid he would doubtless have made it known and furnished them the means of subsistence, which might easily have been done. Instead of which he came with a steamer and as great a force of efficient men as he chose to take with him, and it was in his power, before Friday morning, to have increased that force to any desired extent. I must presume therefore that he had all the assistance that he wished, and the seamen being thus superseded, and the saving of the remnants taken out of their hands, might well consider themselves discharged, and, after remaining near the wreck about forty hours upon charity, seek the means of subsistence elsewhere.

Why should they not have wages? Such performance would, upon the principles applicable to other contracts of hiring, entitle them to the stipulated reward. That policy which makes the compensation of the seaman depend on his saving property, entrusted to his care, for the owner, was intended to secure his fidelity and stimulate his exertions in case of disasters, which usually occur at sea or in remote countries, where the owners cannot be present and oftentimes where none but the crew can know how far their duty has been fully performed. Here the owner appeared, all control over the property was delivered up to him, he assumed the entire management, superseded the seamen, took the business of salvage out of their hands, and in effect discharged

them. Surely the stern rule of maritime policy, which has been adopted to stimulate continued exertions for the benefit of the owner, has no application to a case like this; and the just principles which usually govern contracts for labor need not be intercepted.

This differs from the case of *Lewis* v. *The Elizabeth & Jane*, cited from Ware. There the vessel had been entirely abandoned, left derelict by the crew. It had not been delivered up to the owner. He had never appeared. In such cases it is often difficult, sometimes impossible to ascertain whether more could have been done or not, and the policy of making it for the interest of the crew to persevere, by saying to them when you abandon the vessel you abandon all hope of compensation is manifest, and the accidental circumstance that the derelict is afterwards found by others and brought to the owners, burdened with heavy salvage, does not affect the justice or policy of the case nor resuscitate the claim to wages.

Decree for wages and costs.

Richard H. Dana, Jr. for the libellants.

Sidney Bartlett, for the respondents.

Circuit Court of the United States, Maryland, December, 1845, *at Baltimore. In Equity.*

JAMES G. WILSON *v.* JOSEPH TURNER JR. AND JOHN C. TURNER.

Where a patentee, before the passage of the act of congress of 1836, assigned his right to construct and sell his invention within certain states, and died before the expiration of the term for which the patent was taken out, and his administrator obtained an extension of the patent, for the further term of seven years, under the said act, it was held that the right of the assignee was also extended for such additional term. [See *Washburn* v. *Gould*, (7 Law Rep. 276); and *Woodworth* v. *Sherman*, (Ibid. 279.)]

THIS was a bill in equity, brought by the complainant against the defendants, to restrain them from using a certain machine for planing planks and boards and other materials, which they had erected and were then using in the city of Baltimore. On the 27th of December, 1828, William Woodworth, of the state of New York, obtained a patent for the machine in question, of

which he appears to have been the inventor. According to the law then in force, this patent gave him, and his assignees and grantees, the exclusive right to use this invention for fourteen years only from the date of his patent. On the 28th of November, 1829, Woodworth, the patentee, and James Strong, (who had, by purchase from the patentee, become entitled to one half the interest in the patent,) assigned to Twogood, Halstead, and Tyack, and their assigns, all their right and interest in the patent, to be sold and used in the following places: "namely, in the county of Albany, in the state of New York, in the state of Maryland, (except the western part thereof, which lies west of the Blue Ridge,) in Tennessee, Mississippi, Alabama, South Carolina, Georgia, the Floridas, Louisiana, Missouri, and not in any other state or place within the limits of the United States or the territories thereof, to have and to hold the rights and privileges thereby granted to them and their assigns, for and during the term of fourteen years from the date of the patent." The title of the respondents is derived from the said assignees.

Woodworth, the patentee, died some time before the 9th of February, 1839, on which day letters of administration on his estate were granted to William W. Woodworth. On the 16th of November, 1842, the administrator obtained from the board of commissioners, established by the act of congress of July 4th, 1836, the renewal and extension of the patent for the term of seven years, from and after the expiration of the first term of fourteen years; and on the 9th of August, 1843, assigned to James Wilson, the complainant, all his right, title, and interest, in and to the said letters patent, renewed and extended as aforesaid, for the state of Maryland east of the Blue Ridge.

The complainant contended under this assignment, that he had the exclusive right to the use of the machine in the part of this state above mentioned, from the date of the assignment until the expiration of the extended term of seven years; and that Twogood, Halstead, and Tyack, and those claiming under them, have no right in the patent, by virtue of the assignment of November 26th, 1829, after the expiration of the original term of fourteen years, and that the continued use of it by the respondents was an infringement of his right. Upon this ground he prayed for an injunction.

Taney, J. delivered the opinion of the court as follows, after recapitulating the facts of the case. At the time this patent was originally granted to Woodworth, and at the time of the assign-

ment to Twogood, Halstead, and Tyack, and of the subsequent assignments, until one of the defendants became interested in the patent as assignee, there was no law authorizing, under any circumstances, the extension of a patent beyond fourteen years. At the expiration of that period of time, the exclusive rights of the patentee and his assignees and grantees, terminated, and every person had the right to use the invention, without any consent or license from the inventor. But by the act of July 4, 1836, section 18, the patentee of an invention or discovery was authorized to obtain a renewal and extension of his patent for seven years, after the expiration of the term of fourteen years, upon proving to the satisfaction of the board of commissioners established by that act, that he had failed to obtain, from the use and sale of his invention, a reasonable remuneration for the time, ingenuity, and expense, bestowed upon it, and the introduction thereof into use. And that thereupon the said patent should have the same effect in law, as though it had been originally granted for the term of twenty-one years; and the same act provides, that the benefit of such renewal shall extend to the assignees and grantees of the right to use the thing patented, to the extent of their respective interest therein.

This power of extension applied to patents granted before the passage of this act of congress, as well as to those which should be afterwards issued, and consequently embraced the patent in question. The dispute now before us arises upon the construction of the provision above recited, in favor of assignees and grantees.

It is contended, on the part of the complainant, that this provision embraces only the rights which had been acquired in the original term of fourteen years, and that assignees and grantees of the original patent can claim no benefit from their contracts, in the extended term of seven years; that the latter enures altogether to the benefit of the patentee, and gives him the exclusive right to vend, assign, and use the invention during that period, and authorizes him to prevent the use of it by those who had purchased the privilege for themselves individually, or for particular districts of country, for the original term. Now if this be the construction of the act of congress, the provision in favor of assignees and grantees would seem to the court to be useless and nugatory.

No one, we think, would suppose that the grant of this new right annulled all contracts made under the old one; and that giving to the patentee an additional term of seven years, would deprive purchasers of the right which they had acquired in the original term, before the renewal was granted. If the patentee

had assigned all his right in a particular district or state, for and during the whole fourteen years, or even for a shorter period, surely that contract would continue binding upon him, notwithstanding he afterwards procured an extension of his patent, and congress could hardly have deemed it necessary to make a special provision for its protection. Certainly, according to this construction, the assignees or grantees would derive no advantage from the renewal. Yet the law clearly intended that they should share in the benefit conferred on the patentee, and have some advantage from the extension of the patent for seven years. For it provides, in express terms, that the *benefit* of the renewal shall extend to them; thus using a word which shows that it was not the intention of the legislature merely to protect interests which previously existed in assignees and grantees, but to give them a share in the benefit conferred on the patentee by the renewal of the patent. Moreover, assignees who had purchased the title of the patentee in particular states and territories, and individuals who had paid for the right to use the invention during the original period of the monopoly, might have suffered serious injustice by the grant of a new and further term to the patentee, unless they also were embraced in it; and they would, therefore, very naturally and properly be the objects of protection. For in cases like the present, where the patent was issued and the purchaser obtained his assignment before the passage of the act of 1836, both parties must have understood that the exclusive right of the patentee for its whole period was transferred; and that at the expiration of the fourteen years the assignee would have the right to use the invention without interruption, and without paying the inventor any further compensation. The object of the clause in question in the act of congress, is to preserve the contract in the sense in which both parties understood and intended it, at the time it was made, and to secure to the purchaser the right which he intended to buy and supposed he had bought, and which the patentee must have intended to sell, and at the time of the contract must have supposed he had sold. Indeed, the power of extension given by the act of 1836, would have operated most unjustly upon those who had purchased the right to use a patented machine, if it had not been accompanied by a provision for their protection. For, relying on the assurance given by the law, as it stood when the contract was made, that they had purchased for the whole period of the monopoly, and that they might lawfully continue the use of the invention after the expiration of the fourteen years, many grantees, after having obtained the assignment or grant from the patentee,

had undoubtedly erected costly machinery, and encountered expenses which they would not have incurred, if they had supposed it would be in the power of the patentee to forbid the use of his invention after the term limited by his original patent, and if with these expenses incurred, and arrangements made, for the continued use of the improvement, congress had passed the law of 1836 without this provision in favor of assignees and grantees, it would have enabled the patentee to deal with them most severely and oppressively, and to exact from them a far heavier sum for the extended term of seven years, than they would have been willing, under other circumstances, to have given for the original term of fourteen.

The legislature obviously, we think, intended to guard the party who had purchased from the patentee the right to use his invention until the expiration of his exclusive privilege from the necessity of buying it again; and when they were giving to the patentee a new privilege, and one which he had no legal right to demand, they had undoubtedly a right to annex to it such conditions and limitations as in their judgment justice required.

The construction which we put upon this law is conformable also to the previous legislation of congress upon a similar subject; for in the act passed in January, 1808, entitled "An Act for the relief of Oliver Evans," whereby, in consideration of the particular circumstances of his case, a new patent was granted to him after the expiration of the original one, there is an express provision, that no person who had before paid him for a license to use his improvements should be obliged to renew it, or be subject to damages for not renewing it; thus granting the new patent upon the same principles, with reference to purchasers, that has been adopted and followed in the act of 1836, in cases of the extension of the term.

It is true, as was urged in the argument, that the right of extension is obviously given by the law, chiefly with a view to the advantage of the inventor and not of his assignee or grantee; and that the patent, if extended at all, must be extended on the application of the inventor, and not of his assignee. And the reason of this distinction is evident. The assignee purchases because he supposes the improvement is worth the money he pays for it, and that he can make a profit by his bargain: and if it afterwards turns out that he was mistaken, and his speculation in the patent right proves to be a losing one, there would be no more justice in giving him a new privilege, whereby the public would be compelled to make good his losses, than there would be in the case of any other speculation which proved to be unfortunate. But the same

reason which would operate to prevent an extension to the assignee would apply with equal force between the patentee and assignee, when the right to extend was conferred on the former. For he assigns his right to the exclusive privilege in a particular district of country, or grants it to a particular individual for his own use for a price which he deems adequate and is willing to take; and it would hardly be just, if the invention afterwards proves to be more valuable than he himself supposed it to be, to reinvest him on that account with the exclusive privilege for a new term, in such a manner as would enable him to compel those who had already bought, to buy again; the more especially when the enhanced value is often produced by the industry and expenditures of the assignee or grantee in bringing it into public use and more general notice; there is one evident distinction however between the patentee and assignee as far as the public is concerned. If the invention is a valuable one, the inventor confers a benefit upon the public, and yet, without any fault of his, he may fail to obtain a reasonable remuneration within the fourteen years, for the time, ingenuity and expense which he bestows upon it. His title may be controverted, and a large portion of the time spent in expensive litigation; he may be unable to erect the improvements necessary to show its value and bring it into notice; he may have been unable to make sale of his privilege to others, upon terms which he was willing to take; and as between him and the public therefore, which is to be ultimately benefited by the improvement, there is justice in the extension. It is to cases of this description that the act of congress applies. It proposes to do justice between the inventor and the public, while it protects assignees and grantees in the rights which they had previously acquired by contract with the patentee. Besides, the words of the law appear to us to admit of no other interpretation than the one we have given. It declares that the *benefit of the renewal* shall extend to assignees and grantees of the thing patented, to the extent of their respective interest therein. Now what benefit have they in the renewal, if they are excluded from the use of the thing patented during the whole of the renewed term. According to that construction of the law, so far from receiving a benefit, they would be subjected to loss; they would not even enjoy the right which they supposed they had bought, but would be compelled, at the expiration of the fourteen years, to stop the works they had constructed, at whatever loss it might occasion, unless the patentee gave them leave to proceed. Yet the law in plain terms declares, that they are to derive an advantage from the extension, and that the benefit of the renewal shall extend to them according to their

respective interests. In other words, it means to provide that assignees and grantees shall share with the patentee the benefit of the renewal, according to the interests which they respectively acquired in the thing patented within particular districts of country, or for their own individual use.

Two cases have been referred to upon the construction of this law, which have arisen and been decided in different circuits, and in which there appears to be some conflict in the opinion of the learned judges. It is unnecessary to comment upon them, for inasmuch as there is no settled judicial construction which this court is bound to follow, we must act upon this question as an open one, and decide it according to the dictates of our own judgments; and for the reasons above stated, the injunction prayed for by the complainants is refused.

Several other questions were raised in the argument, but it is unnecessary to advert to them, because the decision upon the construction of the act of congress disposes of the case.

Supreme Judicial Court, Massachusetts, Middlesex, October, 1844.

STONE *v.* VARNEY.

In an action for a libel, evidence that the plaintiff's general character was bad when the libel was published, is admissible under the general issue, in mitigation of damages, although the defendant has filed a plea in justification, or (under the Massachusetts practice) a notice, that he shall prove, in justification, that the allegations in the alleged libel are true.

District Court, for the City and County of Philadelphia, January, 1845, *at Philadelphia.*

FRALEY AND ANOTHER *v.* BISPHAM.

A, B, & C, as partners, brought an action on the case against D. After suit brought, C, for value, assigned to A & B all his interest in the partnership claims, and withdrew from the partnership. A & B having released C from any warranty, and paid into court a sum sufficient to cover costs, offered C as a witness to testify in relation to the contract on which the suit was brought. *Held*, that as the court was satisfied that the assignment was not colorable, but was *bona fide*, and with no special intention to sell testimony, the witness was competent.

Digest of English Cases.

Selections from 3 Q. B., parts 3, 4 and 5; 3 G. & Dav., part 3; 1 Dav. & Mer., part 1; 12 M. & W., parts 1, 2, and 3; 1 Car. & Kir., part 2; 4 M. & Gr., parts 5 and 6; 5 M. & Gr., parts 1, 2, and 3; 6 Scott, N. R., parts 4 and 5; 7 Scott, N. R., part 2; 8 Scott, N. R., part 1.

ADMINISTRATION.

An administrator may maintain *trespass* for the seizure of goods of the intestate between the death and the grant of letters of administration. *Thorpe* v. *Stallwood*, 6 Scott, N. R. 715.

2. One E. P. having sent a quantity of goods to Fernandez Po for sale, died intestate; and after his death, the defendants purchased the goods from the agent of the intestate there, who sold them for the benefit of the intestate's estate; subsequently to the sale, the plaintiff took out letters of administration to the intestate, and now sued the defendants for the price of the goods: Held, that the action was maintainable; that the title of an administrator, though it does not exist until the grant of administration, relates back to the time of the death of the intestate, so as to entitle the administrator to sue in assumpsit for goods sold and delivered; and that, as the act of the agent was ratified by the plaintiff after he became administrator, it was no objection that the intended principal was unknown at the time to the person who intended to be the agent. *Foster* v. *Bates*, 12 M. & W. 226.

AGENT.

An agent has no right, without the authority of his principal, to overdraw a banking account. But if it appear that the agent has done so with the knowledge of his principal, the jury will be warranted in inferring from this that the agent, in fact, has the requisite authority. If the balance of a banking account remain overdue after the bankruptcy of the banker, his assignees are entitled to recover interest on such balance, as well for the period which has elapsed since the bankruptcy, as for that which had elapsed before it. *Pott* v. *Bevan*, 1 C. & K. 335.

2. An act done for another by a person not assuming to act for himself, but for such other person, though without any precedent authority whatever, becomes the act of the principal if subsequently ratified by him: in such case the principal is bound by the act, whether it be to his detriment or for his advantage, and whether it be founded on a tort or a contract, to the same extent and with all the consequences which follow from the same act if done by his previous authority: but it is otherwise where the party did not at the time assume to act as agent. Thus, where goods are wrongfully seized by the sheriff under a *valid* writ of fi. fa., the execution creditor does not, by a *subsequent* ratification only, become liable in trespass for the original seizure. *Wilson* v. *Tummon*, 6 Scott, N. R. 894.

AGREEMENT.

B. being indebted to A. in a large sum of money, signed a document in these terms: "I engage to ship for your account at M., in any vessel you may engage, &c., from forty to sixty tons of Morocco produce on the following terms, &c.; and I also engage that the above shall be shipped by my agent there, within thirty to fifty days from the time of the said vessel being ready to take in her cargo, &c. I do further engage to ship produce on similar terms to the above, to the amount of what I may remain indebted to you after the first shipment as above, within six months from the sailing of the first vessel." A. sent out a vessel and received the goods first mentioned. In an action to recover the residue of the debt: Held, that the agreement could

not be set up as an answer, as it was optional on the part of A. whether he would send out a second vessel; and therefore it did not support a plea, alleging an agreement on the part of A. to send out a second vessel, and receive the goods in liquidation of the debt. *Phillips* v. *Aflalo*, 4 M. & G. 846.

ARBITRATION.

An agreement of reference recited that C. claimed a balance of £201 to be due to him from S.; and it was covenanted between C. and S. that all disputes and differences which existed between them should be referred to the arbitration of B. to determine the account between the parties, and the true balance: Held, that C. was entitled to the decision of the arbitrator upon all matters in dispute up to the time of the agreement, though independent of, and arising subsequently to, the matters upon which the balance of £201 was claimed. *Charleton* v. *Spencer*, 3 Q. B. 693.

ASSIGNMENT.

The plaintiff, a publican, assigned to his brewers, by way of mortgage, "all and singular the household furniture, plate, &c., *stock in trade*, goods, chattels and effects of him the mortgagor, in, upon, about, or belonging to all that inn, &c., and also the tap, yards, stables, buildings, and premises adjoining or belonging thereto, as the same then were in the tenure or occupation of the mortgagor," &c.; and the clause of re-entry empowered the mortgagees, in case of default, "to take, possess, hold and enjoy all and every *the goods, chattels, effects, and premises*, to and for their own absolute use and benefit: Held, that this deed passed only the property and effects that were upon the premises at the time of its execution. *Tapfield* v. *Hillman*, 6 Scott, N. R. 967.

AWARD.

In debt for two calls of £1 each on two hundred shares in a railway company, the defendant pleaded *nunquam indebitatus*, *payment*, and set-off: the particulars of demand claimed one call upon one hundred and fifty shares, and a second upon one hundred and eighty shares; the *cause* being referred, the plaintiffs proved, that at the date of the first call the defendant was the proprietor of six hundred and forty shares, and of twelve hundred at the date of the second call; and the defendant was required to discharge himself by proof of payment of calls upon the whole; and, on his failing to do so, though he proved payment of calls on more than two hundred shares, the arbitrator made an award in favor of the plaintiffs: The court refused to set aside the award, upon a suggestion that the arbitrator had exceeded his authority in requiring evidence as to matters *dehors* the cause. *Eastern Counties' Railway Company* v. *Robertson*, 6 Scott, N. R. 802.

2. Where three arbitrators were appointed, with power to any two of them to make their award, and the award was afterwards made as the award of the three, but it was executed by two only: Held, that the power was well executed. *White* v. *Sharpe*, 1 C. & K. 348.

3. An application made on the last day but one of the term, for leave to move on the last day of the term, to set aside an award, on the ground that the affidavit on which the motion was to be founded had not arrived from the country, was refused by the court. *In re Evans* v. *Howell*, 4 M. & Gr. 767.

4. An action of goods, sold, &c., to which the defendant pleaded a set-off, having been referred to arbitration, the defendant admitted that the plaintiff had a claim against him for £82 3*s*. 8*d*. for goods sold, &c., and for $119 8*s*. 4*d*. the produce of the plaintiff's goods sold by him under a distress for rent, which sums together exceeded the entire set-off claimed by the defendant. The arbitrator omitting by mistake the sum of £119 7*s*. 4*d*. admitted to be due to the plaintiff, awarded that the defendant's set-off amounted to £100 0*s*. 6*d*., and thereby exceeded the plaintiff's damages, which he assessed at £94 13*s*. 4*d*. It appeared by the affidavits, that, on the error being pointed out to the arbitrator, he admitted it, and requested the defendant to allow him to reconsider his award upon the evidence before him, which the latter refused. The error did not appear upon the face of the award, nor did the arbitrator make any affidavit. The court, under these circumstances, refused to set aside the award, adhering to the general rule, that the mistake of an arbitrator is no ground for setting

aside an award. *Phillips* v. *Evans*, 12 M. & W. 309.

BILL OF EXCHANGE.

Where, after bill has been accepted, and before it is delivered to the drawer, an alteration is made by a third party in the date thereof, it is for the jury to say, judging from all the circumstances of the case, whether such third party made the alteration in question with the acceptor's consent, or as his agent; and in either case the acceptor will be liable. *Whitfield* v. *Collingwood*, 1 C. & K. 325.

2. A bill of exchange was indorsed to a branch of the National Provincial Bank of England at Portmadoc, who sent it to the Pwllheli branch of the same bank, who indorsed it to the head establishment in London: Held, that each of the branch banks were to be considered as independent indorsees, and each entitled to the usual notice of dishonor. *Clode* v. *Bayley*, 12 M. & W. 51.

BUBBLE BET.

Plaintiff wagered with defendant that defendant would pass his examination as attorney; defendant passed. Assumpsit being brought on the wager, held, on demurrer to the declaration, that the wager was void, inasmuch as it was in the nature of a bubble bet, defendant having it in his power to win if he pleased. *Fisher* v. *Waltham*, 1 D. & Mer. 142.

CARRIER.

A laundress sent linen, which she had washed, to the owner, by the carrier, whom she had paid. The carrier having lost it: Held, that the laundress was entitled to sue the carrier for the cost. *Freeman* v. *Birch*, 3 Q. B. 492.

CONSIGNOR AND CARRIER.

The traveller of M., a tradesman residing in London, verbally ordered goods for M. of plaintiff, a manufacturer at Paisley. No order was given as to sending the goods. Plaintiff gave them to defendant, a carrier, directed to M., to be taken to him, and also sent an invoice by post to M., who received it. The goods having been lost by defendant's negligence, and not delivered to M.: Held, that defendant was liable to plaintiff. *Coats* v. *Chaplin*, 3 Q. B. 483.

CONTRACT.

The defendant contracted to buy of the plaintiffs ten tons of linseed oil, at 31*s*. 6*d*. per cwt., "to be free delivered by the plaintiffs to the defendant, within the last fourteen days of March, 1838, and paid for at the expiration of that time in cash, deducting two and a half per cent. discount." In an action against the defendant for not receiving the oil pursuant to the contract, the declaration stated, that, although the plaintiffs, "within the last fourteen days of March, 1838, to wit, on the 31st of March, 1838, were ready and willing, and then tendered and offered to deliver to the defendant the said ten tons of linseed oil, and then requested the defendant to accept the same," &c., yet the defendant refused to accept or pay for the same, or any part thereof. The defendant pleaded, first, that the tender was made on the last of the said fourteen days of March, 1838, at a late time of that day, to wit, at nine o'clock in the night time of that day, the same time being, by reason of such lateness thereof, an unreasonable and improper time in that behalf for the said tender and delivery of the said oil; and that the plaintiffs were not until a late, and, for the delivery to and acceptance by the defendant of the said oil, an unreasonable and improper time of the said last-mentioned day, to wit, the hour aforesaid, ready and willing to deliver the said oil to the defendant, *modo et forma*. Secondly, a traverse of the averment that the plaintiffs were ready and willing to deliver the said oil. The plaintiffs replied *de injuria* to the first plea, and joined issue on the second. By a special verdict, it was found that the plaintiffs, on the 21st of March, 1838, at the hour of half past eight in the said day (being a Saturday,) did tender and offer to deliver to the defendant the ten tons of oil in the declaration mentioned; that, from the said hour when the said ten tons of oil were so tendered and offered to the defendant, there was full and sufficient time before twelve o'clock of the said 31st of March, for the plaintiffs to deliver, and for the defendant to examine and weigh, and to receive into his possession the whole of

the said ten tons of oil; that, at the said time, when the said oil was so tendered and offered by the plaintiffs to the defendant, he, the defendant, refused to receive the same, alleging that the said hour of the said tender was a late, and, by reason thereof, an unreasonable hour in that behalf." The jury then found, "that the said hour of half past eight of the night of Saturday, the 31st of March, when the said oil was so tendered and offered to be delivered to the defendant as first aforesaid, was a late, and, by reason of its lateness, an unreasonable and improper time of that day for the tender and delivery of the said oil; and that the plaintiffs did not tender or offer, nor were they ready to deliver the said oil to the defendant, until a late, and, for the delivery to and acceptance by the defendant of the said oil, an unreasonable and improper time of the said last-mentioned day, namely, the said hour of half past eight in the night;" Held (Lord Denman dissenting,) that, in the absence of any usage of trade to the contrary, the tender was sufficient: the plaintiffs having, by the terms of the contract, up to twelve o'clock of the night of the 31st of March, to deliver the oil, and the jury having found that the tender was made to the defendant at an hour which left time enough for completing the delivery before the end of the natural day. *Startup* v. *Macdonald*, 7 Scott, N. R. 269.

CO-SURETIES, LIABILITY OF.

A surety may recover contribution from his co-surety, in an action for money paid. And he may recover contribution according to the number of the sureties, without reference to the number of the principals. Where the plaintiff and defendant had executed, as sureties, a warrant of attorney, given as a collateral security for a sum of money advanced on mortgage to the principals, and on default being made by the principals a judgment was entered up on the warrant of attorney, and execution issued against the plaintiff: Held, that he was entitled to recover from the defendant, as his co-surety, a moiety of the costs of such execution. *Kemp* v. *Finden*, 12 M. & W. 421.

DEBT OF RECORD.

A debt of record may be discharged by a release under seal. *Barker* v. *St. Quintin*, 12 M. & W. 441.

DEVISE.

The testator devised as follows: "I give and devise unto J. G. all my lands, &c. for and during his natural life, and, from and after his decease, I give and devise the same unto all and every the issue of the body of the said J. G., share and share alike, as tenants in common, and the heirs of such issue:" Held, that J. G. took an estate for life. *Greenwood* v. *Rothwell*, 6 Scott, N. R. 670.

2. The testator died in 1824, leaving him surviving his grand-daughter, the said M. H. J., the said A. J., the wife of the said T. R. B. J., who had four children, and the said S. R., who had seven children. M. H. J. married in 1825 and died in 1833, leaving three children who were infants at the time of her death. Some of the children of A. J. and S. R. attained the age of twenty-one: Held, that M. H. J. was tenant for life, with a contingent remainder in fee to such of her children as should attain twenty-one; and as no child had attained twenty-one when the particular estate determined by her death, the remainder was necessarily divested, and the children took no interest in the estate devised: Held, also, that the limitations over were divested by the same event, and that the estate vested in the heir at law. *Festing* v. *Allen*, 12 M. & W. 279.

EVIDENCE.

In ejectment, to prove that the land in question was part of the estate of the lessor's ancestor, a counterpart of a lease purporting to demise that land, was produced from the ancestor's muniment room: it was dated in the ancestor's lifetime, and appeared to be executed by the person named as lessee, but by no one else. The lease itself was not produced, nor any excuse shown for the non-production. No privity appeared between the lessee and the defendant in the ejectment: Held, that the counterpart was admissible. *Doe* d. *the Earl of Egremont* v. *Pulman*, 3 Q. B. 622.

Notices of New Books.

A Treatise on Crimes and Misdemeanors. By Sir William Oldnall Russell, Knt., late Chief Justice of Bengal. By Charles Sprengel Greaves, Esq., of Lincoln's Inn and the Inner Temple, Barrister at Law, and a magistrate for the County of Stafford. Fifth American, from the Third London Edition. With the Notes and References contained in the former American Editions, by Daniel Davis and Theron Metcalf, Esqrs. And with additional Notes and References by Geo. Sharswood. 2 vols. Philadelphia: T. and J. W. Johnson.

This work, allowed to be the best for a practical lawyer ever published upon the subject, has reached the fifth edition in this country. The first two editions received respectively the editorial labors of Mr. Davis and Mr. Metcalf, and the present editor has added his contribution, to render the subsequent editions more useful to the American bar. The edition which we are now noticing, contains a greater amount of matter than the preceding, besides comprising the later statutes and decisions in England and in this country, brought down to the present time. Mr. Greaves, the English editor, says in his preface: "In preparing this edition for the press, the system adopted by the author has been followed as nearly as could be; and the statutes and cases have been introduced in a manner similar to that which the author himself pursued in preparing the second edition. The new statutory provisions have been inserted at length, from the statutes themselves; and the cases have been introduced in such a manner, as, it is hoped, may afford a clear view both of the facts and of the decision in each case. Particular attention has been paid to this point, in order to render the work useful, on occasions where a question suddenly arises, in the course of a trial, or where there may not be the means of referring to the reports from which the cases are taken. Some cases, collected by myself, have been inserted in the work, and such are marked, 'MSS. C. S. G.'" The order of the chapters in the Book of Evidence is altered, from a desire to introduce Lord Denman's bill for amending the law relative to incompetency of witnesses arising from interest, but the editor was disappointed in not being able to introduce it.

The following is the advertisement of the American editor. "In the American editions of this work, which have been heretofore published, many entire chapters were omitted, for the reason, that as they related to statute offences, they could have no applicability to this country. The publishers of this edition, however, have resolved to offer to the public the complete work, considering that the chapters omitted, besides containing much useful information on the actual state of the criminal law of England, abound in very interesting decisions on the construction of words in acts of the legislature, to which it must, at times, be useful everywhere to resort. They have included the notes of the former American editors, with a few exceptions, and the references to American authorities have been carefully brought down to the present time." The part of the English work omitted in the previous American editions, but retained in the present edition, were those relating to the following subjects: Of counterfeiting, or impairing coin; of importing into the kingdom counterfeit or light money, and of exporting counterfeit money;

of frauds relating to bullion, and of counterfeiting bullion; of buying, selling, receiving, or paying for counterfeit coin at a lower rate than its denomination imports; of serving, or procuring others to serve, foreign states; of seducing soldiers and sailors to desert and mutiny; of offences against the revenue laws, relating to the customs or excise; of hindering the exportation of corn, or preventing its circulation within the kingdom; of administering or taking unlawful oaths; of neglecting, or delaying to deliver, election writs; of forestalling, regrating, and ingrossing, and of monopolies; of returning, or being at large, after sentence of transportation, and of rescuing or aiding the escape of a person under such sentence; of going armed in the night time for the destruction of game, and of assaulting gamekeepers; of stealing and destroying deer; of taking or killing hares, or conies, in a warren; of unlawful taking, or attempting to take, fish; of stealing in any vessel in port, or upon any navigable river, &c., or in any creek, &c., and of plundering shipwrecked vessels; of larceny and embezzlement by persons in the post-office, of stealing letters, and of secreting bags or mails of letters; of embezzlements and frauds by bankrupts; of embezzlement and frauds by insolvent debtors; of unlawfully receiving, or having possession of, public stores; of unlawfully receiving tackle or goods cut from or left by ships, and of receiving goods stolen on the river Thames; of forging the securities of public companies, other than the bank of England; of forging and transposing stamps; of the forgery of official papers, securities, and documents; of injuring and destroying trees, shrubs, or underwood; of destroying, &c., plants, roots, fruits, and vegetable productions; of cutting and destroying hop-binds; of breaking down, &c., seabanks, locks, and works on rivers, canals, &c.; of destroying the dams of fish-ponds, &c., mill-ponds, and of putting noxious materials into fish-ponds, &c.; of destroying or injuring bridges, turnpike gates, &c.; of destroying fences, walls, stiles, or gates; of the destroying and damaging mines, and mine engines; of destroying and damaging articles in a course of manufacture, and of destroying, &c., implements and machinery; of destroying and damaging ships and other vessels, and articles thereunto belonging; of wilful or malicious damage to real or personal property, not otherwise provided for.

Among the additions to the present work, we notice a great part of the chapter relative to accomplices and their testimony, and also the late alterations in the English law, in relation to the binding effect of an oath, administered according to the peculiar belief of the person swearing, the admissibility of Quakers, Moravians, and Separatists to testify on affirmation, and the competency of inhabitants of parishes and other districts, and of churchwardens and others, nominal parties, to testify on any trial.

We take the following from the numerous notes of recent decisions. Upon an indictment against Webb, and three other prisoners for sheep stealing, the counsel for the prosecution proposed to call the wife of Webb, to prove facts against the other prisoners, and urged that it was only in cases where the acquittal or conviction of one prisoner had a direct tendency to cause the acquittal or conviction of the other prisoners, that the wife of one prisoner was incompetent to give evidence for or against the other prisoners; but Bolland, B. held, that the witness was incompetent. *Rex* v. *Webb*, (Bushel, J., and T. Croome, Gloucester Spring Ass. 1830.) Where, however, the husband has either been convicted or acquitted of the same felony, respecting which the wife is called as a witness, she is competent to be examined. Thus, on an indictment for sheep stealing, the wife of a person who had been previously convicted of stealing the same sheep, was held a competent witness for the prosecution. *Regina* v. *Williams*, (8 C. & P. 284). But it seems now to be settled, (notwithstanding a ruling of Lord Kenyon the other way,) that the rule relates to persons who have entered into the relation of husband and wife; and does not extend to those who, not being married, have lived together and cohabited as man and wife. *Wells* v. *Fletcher*, (5 C. & P. 12); *Batthews* v. *Galindo*, (4 Bingh. R. 610.)

REPORTS OF CASES ARGUED AND DETERMINED IN THE SUPREME JUDICIAL COURT OF THE STATE OF MAINE. By John Shepley,[1] Counsellor at Law. Vol. 9.

The volume just published is the 9th of Shepley, and the 22d of the Maine Reports. The first nine volumes were prepared by Mr. Greenleaf, now Professor of Law, at Cambridge; three were by Mr. Fairfield, now senator in congress from Maine; nine by Mr. Shepley, and one by Mr. Appleton, of Bangor, who occupied the reporter's chair one year. The present volume contains one hundred cases, and brings us to the close of Maine term of 1843, in Lincoln county. Of the opinions, forty were drawn by Chief Justice Whitman, thirty-eight by Judge Shepley, and eighteen by Judge Tenney. In addition to these, an opinion, dissenting from the judgment of the majority, was delivered by the chief justice, in the case of *Owen* v. *Boyle*, in Washington county, on a question involving a point of English law, namely, the right to distrain for rent, the goods of a stranger, stored in the warehouse of the plaintiff's lessee, which was situated on the island of Campo Bello, in the British territory. The majority of the court decided that property so situated was not liable to distress for rent; and the arguments are given at length in support of their different views.

The opinions are for the most part drawn with conciseness, and great plainness of language: they make no attempt at display, nor do they fatigue us with long discussions upon general principles; which, we humbly submit, is too much the practice at the present day, and is precisely what the profession do not need in reports of the cited cases. The judges in this country have, in general, been too verbose in their decisions — they have often diffused and amplified until the poor searcher after the kernel of the case, has been well wearied and almost lost in the folds of the spacious mantle that conceals the precious seed. The tax on our purse has been equal to that on our patience. What we want in the reports is, not lengthened dissertations upon abstract questions, but the application of the law briefly and with suitable illustrations to the matter in hand.

The present volume is cotemporary with the 6th of Metcalf, and contains about the same number of pages; but Metcalf furnishes us with but seventy-five cases, instead of one hundred in the volume before us. He occupies more space with the arguments of counsel than many would deem necessary or important. For the volume of Maine reports, which in mechanical execution sustains a fair comparison with Metcalf, we pay $2 25; while for Metcalf, with twenty-five less cases, we are taxed $4 50. Is their any reason for this disparity in the actual cost of the work? Is there not something of a book-making spirit in the matter? Is it not proper for the profession, who are called upon at the present day from so many quarters, to supply their libraries, to ask whether there is not some remedy for the disproportionate price of law books, above every other species of books? What reason is there, for instance, that we should be compelled to pay $6 00 for Greenleaf's Evidence, $6 00 for Hilliard's Digest, and so on for other similar works?

The legislature of Maine has wisely interfered in behalf of the profession, in regard to these reports; and bestowing a salary of $1000 a year on the reporter, requires that the price of the volume, to be published once a year, shall not exceed $2 25, when sold in the state. Is not this a good law? Cannot Massachusetts do the same? Maine has always manifested a high respect for her judicial tribunals; her courts have been adorned with an able, learned and upright judiciary, from whom the ermine of justice has received no stain. The present volume of reports sustains the reputation of her judges for careful investigation, calm judgment and sound learning.

[1] This notice which has been sent to us by a highly respectable practitioner in Maine, may be regarded as an account in off-set to the notice of Mr. Shepley's 8th volume, by one of our well known contributors, in our last volume, page 519. We have not seen Mr. Shepley's last volume, and can express no opinion of its merits; but we dissent widely from some of the writer's opinions in the present notice, especially where he says that Mr. Metcalf's reports of the arguments of counsel are too long. Whether, as the writer requests, some condensing process might not be applied advantageously to the opinions of the court, our readers will judge. — EDITOR.

Intelligence and Miscellany.

English News. — Mr. Baron Gurney has retired from the bench, to which Mr. Platt, queen's counsel, has been promoted. The Law Magazine says that "Mr. Platt's extreme amiability in private life will have freer development on the bench than amidst the antagonism of the bar." We trust the remark may prove more true in Westminster Hall than it has, oftentimes, in this country. In connection with this appointment the Law Magazine further remarks, that no judicial vacancy has lately occurred without a storm of personality and partisan venom in the papers, akin to the parochial paroxysm which attends a contested election of beadles. Individual members of the bar are thus made at the same time the objects of panegyric and abuse, alike obnoxious to the feeling of the profession itself, which is alone competent to estimate the qualifications of its members for judicial rank.

It is currently reported that one or two of the judges in the courts of queen's bench and common pleas are likely to change places.

Sir Charles F. Williams, the commissioner of bankrupts, is dead, and has been succeeded by Mr. Shepherd, the son of the late chief baron of Scotland.

The case which has created the most interest in Westminster Hall of late, is that of Mr. Carus Wilson on habeas corpus. The point seems to be the right to issue prerogative writs to the Channel Islands.

The ill health of Mr. Justice Erskine has induced him to retire, and Mr. Erle has been appointed in his stead. This appointment is regarded as highly creditable to the government, inasmuch as Mr. Erle brings no powerful family interest to the service of the cabinet; and as a politician, his votes and opinions in parliament were uniformly opposed to the prevailing views of the government, to whose voluntary selection the profession owes his appointment.

Mr. Commissioner Merivale, a gentleman of distinguished attainments, is dead, and Mr. Sergeant Goulding has succeeded in the court of bankruptcy.

Mr. Holt's death has vacated the post of vice-chancellor of the county Palatine of Lancaster, to which Mr. Horace Twiss, the biographer of Lord Eldon, succeeds.

It is rumored that the projected presidency of the judicial committee is destined for Sir William Follett. So says the Law Magazine, but we have seen it stated that Lord Brougham, who we believe was the originator of the project of such an office, would not object to the appointment himself.

Law Magazines.—After a suspension of several months the London Law Magazine has commenced with a new series. Mr. Hayward, the former editor, has retired, but we are not informed who his successor is. The Magazine is printed in a somewhat different style and is enlarged. A new department of "Notes on Leading Cases" has been introduced. This magazine has been the ablest work of the kind in England. It has been tory in its politics, but there seems now to be something of a change in its tone, although it professes scrupulously to avoid matters purely political or literary, and adopts that most discreet of prospectuses — *spectemur agendo!* It is stated in a private letter from London, which we have been permitted to read, that Lord Brougham has no less than five articles in this magazine since the commencement of the new series. We are led to doubt this somewhat from an

examination of the work, although there are some which have the marks of his vigorous style. It is possible, that in the article on Lord Abinger, he defends his own apostacies. We presume the reason of Mr. Hayward's leaving the work was an increase of business. He has received a silk gown of late, if we are not mistaken. He is said to be a well read lawyer, a man of fashion, a writer for the Quarterly Review, and, we may add at this distance, a thorough tory *toady*. He figures under one of the characters in Warren's Ten Thousand a Year.

The Western Law Magazine for February was duly received. It contains the answers from Indiana to the editor's questions — a record of the doings of the Supreme Court of Ohio in Bank, and several full reports of cases, together with several pages of Miscellany.

The American Law Magazine, for January, contains eight long articles on subjects of interest, such as the Liability of Railroads to Execution; Law of Foreign Missions; The Law of Real Property; Treason; Injunctions; The Liability of Corporations for the Debts of the Corporation; Recent English Statutes on the Law of Evidence; Memoir of William Lewis. Also the usual digests and Critical Notices.

The Pennsylvania Law Journal for February contains no less than nine decisions and a copy of the oldest mortgage on record in that state. This is a neat and well edited journal, invaluable to practitioners in Pennsylvania.

John Randolph's Will. — One of the most remarkable cases, ever presented to our courts of justice, is certainly Mr. John Randolph's will. His own extraordinary life, his brilliant genius, singular eloquence, the distinguished figure which he has cut in our national councils, in some of the most important epochs of our political history, and his eccentric habits both in public and private life, have stamped a degree of interest upon almost everything which he did or said, that falls to the lot of few individuals. He died possessed of a very large property, that has been estimated at some hundred thousand dollars — a large number of slaves, and valuable broad land on the Roanoke — from which he borrowed his celebrated affix of John Randolph of Roanoke. The disposition of this property has been a bone of contention among different parties ever since his death. Several papers were left behind him, which were considered in the light of last testaments; and the question was, which was the true will, or whether there was any. One will was disputed for its want of form. It was said to have been cancelled by himself. His eccentric habits, and the marks of insanity which appeared in his conduct at several periods of his life, led to contests about another. If this will (that of 1821) was established, it cut off his nearest relation from all right to his property. It left all his slaves free, and the great burden of his possessions to Mr. Bryant, who had married one of his nieces. The question was bandied about from court to court, until the general court decided in favor of the validity of the will of 1821. The other parties then opened a new battery against it.

They availed themselves of one of the statutes of Virginia, and renewed the attack. It was shifted from one district to another — from the Williamsburg circuit court, where Judge Upshur had presided, to the Petersburg court, where judge Gholson was upon the bench. After a long delay, it came to a hearing before a sworn jury in December last. Well, the parties and the lawyers went to work. The Colonization Society and Mr. Bryant united their forces to establish the will of 1821. His nearest relations attempted to upset it. The plea put in was *insanity*.

Perhaps no will case in this country has ever called out such an extraordinary combination of circumstances; fifty or sixty witnesses, drawn from different parts of Virginia and from Philadelphia, were examined in the course of the hearing, exclusive of written evidence. The investigation embraced various periods of his life. It extended to his public transactions — to speeches which he had made in congress — to essays which he had written — to his private correspondence — to the course of his politics as well as to his courtships.

The array of counsel was tremendous. Six lawyers on each side from different towns, and some of the most prominent

standing, were enlisted in the cause. The argument ran through more than three weeks, and almost as long as the great debate on Texas, with this difference, that *here* the champion was at liberty to speak as long as he pleased, but *there* he was limited to an hour each. The impression, however, was, with many people, that all this was labor and law lost — that the jury would be hung, that is to say, divided — and that they would have to begin the battle over again. Some wag said, if they did not take care, they would contrive to eat up the estate before it was settled — like the monkey sharing the cheese in the fable. It turns out, however, that on Tuesday a verdict was given by the jury to set up the will of 1821.

It was the intention of the heirs at law to move for a new trial, but we learn from the Petersburg Intelligencer that an arrangement has been effected, with which all parties are satisfied. By this the slaves obtain their freedom and thirty thousand dollars — the rest of the property going to the heirs at law. — Richmond Enquirer.

Duer on Marine Insurance. — We are glad to learn that the first volume of this work, to which we alluded at some length in a former number, is ready for the press. It will be completed in three volumes octavo, of from seven to eight hundred pages each, and will be delivered to subscribers at four dollars a volume. The first volume will be put to press as soon as five hundred subscribers can be obtained. This treatise, as we are informed, is intended to contain a more full and practical exposition of the law of marine insurance, in its whole extent, than has hitherto appeared; and, from the style and method of its composition, will be adapted to the use of merchants as well as lawyers. Having heretofore experienced the highest degree of confidence in the proposed work, it only remains for us to express our pleasure at the prospect of its speedy publication.

Crime in Boston. — The abstracts of the district attorney's reports for Massachusetts have just been printed, and show an amount of labor performed by the attorney for Suffolk, which must have overwhelmed an ordinary man. The whole number of entries on his report is 1078. 342 of these cases were for breaches of the license law, and the costs to the commonwealth in one of them were $206 16. He has been in attendance upon the municipal court 163 days, and the grand jury have been in session 66 days. He has conducted three trials for murder in the supreme judicial court, has given 29 written opinions to the governor, upon requisitions for fugitives from justice, has attended to 35 suits upon recognizances, and has argued 12 cases brought from the municipal court to the supreme judicial court upon questions of law. $5931 96 have been paid over by him to the treasurer of the commonwealth, being the amount collected by him upon forfeited recognizances, and suits for over $8000 more are still pending. Of the 204 verdicts taken during the year in the municipal court, 142 have been of "guilty," and 62 of them of "not guilty." Of all the cases under his charge during the year, only 27 were continued to 1845. At the end of the year 1843, 82 cases were continued to 1844.

Hotch-Pot.

It seemeth that this word *hotch*-pot, is in English a pudding, for in this pudding is not commonly put one thing alone, but one thing with other things put together. — *Littleton*, § 267, 176 a.

At the age of twenty-one, and before he commenced the study of law, Lord Eldon eloped with a young lady, who at midnight descended by a ladder from her chamber window into her lover's arms, and with whom he fled to Scotland, where the parties were married. It so happened that not long after this he gave lectures on the law at Oxford, as deputy for Sir Robert Chambers, the Vinerian professor. Talking to Mrs. Foster of these lectures, Lord Eldon said, "the most awkward thing that ever occurred to me was this: Immediately after I was married, I was appointed deputy professor of law at Oxford, and the law professor sent me the first lecture to read *immediately* to the students, and which I began without knowing a single word that was in it. It was upon the statute of young men running away with maidens. Fancy me reading, with about one hundred and forty boys and young men all giggling at the professor. Such a tittering audience no one ever had." Among the first cases which he had to manage was one which he thus describes to Mrs. Foster: "I got into a dilemma with one cause at Lancaster. The plaintiff was a farmer of some substance, and the other party was son of a farmer of some substance also, who had run off with the daughter of the plaintiff, and it was for dam-

ages for loss of her services that this action was brought. Well, the instructions the farmer gave me were these: "Mind, lawyer Scott, you are to say that the man who runs away with another man's daughter is a rascal and a villain, and deserves to be hanged." "No, no, I cannot say that." "And why not? Why can't you say that?" "*Because I did it myself;* but I will tell you what I will say — and I will say it from my heart — I will say, that the man who begins domestic life by a breach of domestic duty, is doubly bound to do everything in his power to render both the lady and her family happy in future life; *that* I will say, for I feel it." Well, he was obliged to give up that point; and the jury after a deliberation of nine hours, gave a verdict of £800 damages.

Our readers will be glad to hear, that the new edition of Veazie's Reports, by Mr. Sumner, is more than half printed, the twelfth volume being through the press. Mr. Sumner was interrupted in his labors by a severe attack of sickness, and several of the volumes have been edited by Mr. Perkins, one also by Mr. C. B. Goodrich. Mr. Sumner has, with returning health, resumed his labors, and the work will soon be through the press. We regard it as a most valuable contribution to the *equity side* of the profession, and are not surprised to learn that more than six hundred of the thousand copies printed, have been subscribed for.

We have obtained from Washington a copy of the opinion of the supreme court, in the case in bankruptcy to which we referred in our last number. It is the case of *Ex Parte, the City Bank of New Orleans in the Matter of William Christy, Assignee of Daniel T. Walden, a bankrupt,* v. *The City Bank of New Orleans.* (See 6 Law Rep. 235.) It came before the court on a motion for a writ of prohibition to the judge of the district court of the United States for the eastern district of Louisiana. We regret that the opinion, which is very long, was received too late for insertion in the present number. It will appear in our next.

In the legislature of Massachusetts the committee on the judiciary were instructed to inquire into the expediency of allowing the courts to appoint members of the bar to examine candidates for admission to practise, a duty now imposed on the courts themselves. We were glad to see that the committee reported against the proposed alteration; but we next expect to see a proposition to make "a good moral character" the only test. And we doubt not it may come from a member of the bar, unless some popularity-hunting judge gets the start in such a delectable race.

The late Lord Abinger (Sir James Scarlett) when at the bar was considered superior in his own particular line as a nisi prius lawyer. No leader since Erskine, it is said, had assumed so complete a superiority in the courts of common law; and, as far as success in obtaining verdicts went, he was superior to Erskine; probably also, in the extent of business. He received for some years together £17,000 a year! This to an American lawyer seems large. We recently heard Mr. Webster's professional income for one year since he left the senate stated as $24,000.

Hon. William Kent, judge of one of the circuit courts of New York, having resigned his seat, has been succeeded by John W. Edmunds, Esq. It is stated in the New York Commercial Advertiser, that the members of the bar have commenced a subscription for the purchase of a service of plate for Mr. Kent, and another to procure his portrait for the library of the law institute, in testimony of the high regard in which he is held by the profession.

We call the attention of our readers to the case of Peter York, in our present number, involving a point of great interest in criminal law, upon which the supreme court of Massachusetts were unable to agree, Wilde J. dissenting from the rest of the court. We doubt whether many professional men, at this day, can have much doubt how the law will ultimately settle down upon the point in respect to which the court are divided.

We see it stated in the newspapers, that the case of *Conrad* v. *Williams* for a breach of promise of marriage, has been tried a second time. At the first trial, the jury returned a verdict of $8000 for the plaintiff. A new trial was ordered, and we gave the opinion of the court, (ante p. 336.) At the second trial the jury were out nineteen hours without being able to agree.

An Illinois newspaper states, that the legislature of that state is making a revision of the laws, and adds that "if the legislature sits until the first of March, the revision will have gone through the two houses with race-horse expedition;" and *we* will add, it will, perhaps, be about as useful for practical purposes as a race-horse is said to be.

The ungracious tone of judges towards the bar has done more to undermine the stability of the judiciary, than all the efforts of all the demagogues since Thurlow thundered to the lords, and Ellenborough scowled from the king's bench.

Charles Gilman, Esq., of Quincy, Ill., and formerly of Bangor, Me., has been appointed reporter of the supreme court of Illinois, in place of Mr. Scammon, who had resigned.